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Supreme Court, U.S.
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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY,
Petitioner,

- v. -

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JULY 9, 1970

CERTIORARI GRANTED OCTOBER 12, 1970

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

- 3.14.68 Petition filed
- 3.27.68 Notice of representation hearing, dated
- 4. 4.68 Hearing opened
- 4.18.68 Hearing closed
- 5. 7.68 Respondent's motion to correct the record, dated
(Granted, see footnote 1, page 1 of the Decision &
Direction of Election.)
- 5.22.68 Decision and Direction of Election, dated
- 5.31.68 Respondent's request for review, dated
- 6. 7.68 Petitioner's statement in opposition to Respond-
ent's request, received
- 6.17.68 Respondent's motion to withdraw Decision &
Direction of Election and dismiss petition, dated
- 6.18.68 Board's teletype denying Respondent's request,
dated
- 6.19.68 Regional Director's teletype denying Respond-
ent's motion to withdraw Decision and Direc-
tion of Election & dismiss petition, dated
- 6.21.68 Notice of Election for
- 6.21.68 Tally of ballots issued
- 6.21.68 Certification on Conduct of Election of
- 6.28.68 Respondent's objections to conduct of election,
dated
- 10.11.68 Regional Director's supplemental Decision and
certification of representative, dated
- 10.19.68 Respondent's teletype, exception to the supple-
mental Decision and certification of representa-
tive, dated

11. 1.68 Board's teletype denying Respondent's request for review of supplemental decision & certification of representative, dated

1-CA-6498

- 10.23.68 Charge filed
11. 8.68 Complaint & notice of hearing, dated
- 11.18.68 Respondent's motion for bill of particulars, dated
- 11.22.68 General Counsel's answer to Respondent's motion, received
12. 3.68 General Counsel's Motion for Summary Judgment, dated
12. 3.68 Regional Director's Order referring motion to the Trial Examiner, dated
12. 4.68 Respondent's answer to complaint & notice of hearing, received
12. 6.68 Trial Examiner's Order to show cause on motion for summary judgment, dated
1. 2.69 Respondent's reply to show cause, received
- 1.28.69 Trial Examiner's Decision, granting *inter alia* the motion for summary judgment, dated
- 1.29.69 Addendum to motion for summary judgment, dated
- 1.29.69 Regional Director's Order referring addendum to motion for summary judgment to the Trial Examiner, dated
3. 3.69 Respondent's exceptions, received
3. 3.69 Charging Party's exceptions, received
- 4.17.69 Decision and Order issued by the National Labor Relations Board, dated
5. 1.69 Respondent's motion for reconsideration, received
- 8.11.69 Board's Order denying motion, dated
- 9.26.69 Respondent's motion to reopen hearing and to adduce additional evidence, received

- 9.30.69 General Counsel's teletype opposing Respondent's motion to reopen the hearing, dated
- 10. 1.69 Charging Party's teletype opposing Respondent's motion to reopen the hearing, dated
- 10.22.69 Board's Order denying Respondent's motion, dated
- 11.12.69 Board's application for enforcement
- 11.28.69 Respondent's answer to application, filed
- 5.21.70 Opinion and Decree of U. S. Court of Appeals for the First Circuit, issued
- 5.29.70 Motion to stay order filed. Order staying decree issued
- 10.12.70 Order granting certiorari issued

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

CASE NUMBER 1-RC-9973

MAGNESIUM CASTING Co.

EMPLOYER

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO

PETITIONER

John F. Kennedy Federal Building
Boston, Massachusetts
Room 2007-A

Thursday, April 4, 1968

The above-entitled matter came on for hearing, pursuant to notice, at 1:00 p.m.

Before:

FRANCIS V. PAONE, Hearing Officer.

Appearances:

JEROME H. SOMERS, Esq., Stoneman & Chandler, 79 Milk Street, Boston, Massachusetts, appearing on behalf of the Employer.

WARREN H. PYLE, Esq., Angoff, Goldman, Manning & Pyle, 44 School Street, Boston, Massachusetts, appearing on behalf of the Petitioner.

* * *

[3]

PROCEEDINGS

Hearing Officer Paone: The hearing will be in order. This is a formal hearing in the matter of Magnesium Casting Co., Case No. 1-RC-9973 before the National Labor Relations Board. The Hearing Officer appearing for the National Labor Relations Board is Francis V. Paone.

All parties have been informed of the procedures at formal hearings before the Board by service of statement of standard procedures with notice of hearing. I have additional copies of this statement if any party wishes more.

Will Counsel please state their appearance for the record.

For the Petitioner: Angoff, Goldman, Manning & Pyle by Warren H. Pyle, 44 School Street, Boston, Massachusetts.

For the Employer: Entering a special appearance only to argue against the holding of this hearing and to argue for a postponement, Stoneman & Chandler by Jerome H. Somers, 79 Milk Street, Boston.

Hearing Officer: Are there any other persons, parties or labor organizations in the hearing room at this time who claim an interest in this proceeding? Let the record show no further response.

At this time I propose to receive in evidence as Board's Exhibit [4] No. 1 the following papers in this proceeding which I shall designate for the record as follows: (a), petition for certification of representatives pursuant to Section

9-C of the National Labor Relations Act as amended filed March 14th, 1968 by United Steelworkers of America, AFL-CIO signed by James W. Debok, Staff Representative; (b), notice of representation hearing signed by Albert J. Hoban, Regional Director, Region One, National Labor Relations Board, Boston, Massachusetts, March 27th, 1968; (c) affidavit of service of copy of notice of representation hearing and petition with Form NLRB 4669 attached, signed by Helen L. Brock before Mary D. Ferrari, designated agent, National Labor Relations Board, together with certified mail receipts indicating service on the parties.

Are there any objections to the receipt of these documents in evidence? Mr. Pyle?

Mr. Pyle: No objection.

Hearing Officer: Mr. Somers?

Mr. Somers: I would like to state the position of the Employer at this time prior to making any stipulations or making any statements. As you noted, we are making a special appearance only in this case. It's the position of the Employer that the hearing today should not be held and should be postponed. And the reasons for such are as follows: In the afternoon of March 29th, 1968 a charge was filed by the [5] Employer against United Steelworkers, subsequently docketed as Case No. 1-CB-1362. The charge alleged that certain supervisors acting on behalf of the Union were distributing campaign literature to employees on company time and on company premises and also urging employees at various times both on and off premises to sign Union authorization cards.

The seriousness of the charge I think is very clear not only as to an unfair labor practice as such in the restraint and coercion of employees in the plant, but also going to the showing of interest of the Petitioner in this case. It would not only go strictly to an unfair labor practice charge, but also the substance of this hearing.

The Charging Party at that time did not file a request to proceed because of its feeling that this charge had to be investigated and should have been investigated prior to the holding of any hearing. On April 2nd a letter was received by the Charging Party. This was actually a copy of the letter sent to the charged party. On April 2nd a letter was sent to the Board outlining the specific evidence which the Charging Party wished to present. The investigation has in fact been begun. It has begun.

According to the manual of the National Labor Relations Board under Section 11730 when R cases, representation, and C cases, unfair labor practice—

Mr. Pyle: 117.30?

[6] Mr. Somers: 11730. When concurrent R and C cases are pending, the R case hearing, if it has not been held, is postponed. This is expressed explicitly to be the general policy of the Board.

In fact this is not the policy that is being followed today; and, in fact, the Employer—the Charging Party in the CB case—has received no indication as to why in fact that policy is not being followed.

And in view of this we are making the special appearance, and we do not intend to proceed on the merits or on the substance contained in the R case petition. We are not willing to stipulate to any of the relevant facts, and we are not willing at this time to present any evidence.

Therefore, I move that this hearing be postponed until the investigation of the CB charge has been completed and disposed of one way or another.

Hearing Officer: Mr. Somers, on April 3rd you received a telegram, did you not, signed by Albert J. Hoban, Regional Director, National Labor Relations Board, stating, "Receipt of your letter dated 4/2 requesting postponement of hearing in 1-RC-9973 is acknowledged. Upon consideration thereof, your request is denied."

Mr. Somers: That is correct. We did receive that, no reason being stated in Mr. Hoban's telegram.

[7] Hearing Officer: Did you receive any further communication from the Board?

Mr. Somers: Yes, we received a communication from the National Labor Relations Board from Mr. Kleebl.

Hearing Officer: That communication being namely a Teletype stating, "Re: Magnesium Casting Co., 1-RC-9973. Board will not interfere with Regional Director's decision to proceed with hearing in this case. Although unfair labor practice charges normally block processing of representation cases, the Regional Director may in his discretion elect to proceed with hearing, despite pendency of unfair labor practice charge. Signed Howard W. Kleebl, Deputy Executive Secretary, NLRB, Washington, D. C."

Did you receive that?

Mr. Somers: We received both of those.

Mr. Pyle: Do you mean to say this company went all the way to Washington to try to postpone this hearing?

Mr. Somers: We went to Washington, Mr. Paone, in order that the proper procedures and customary procedures be followed, as they normally are.

* * *

[8] Mr. Somers: We have had many cases and we have represented many people before the Board, and when circumstances such as these arise, whether it be the Union filing the charge or the Employer filing the charge, the customary procedure that has always been followed insofar as our office is knowledgeable is that the representation proceeding is postponed pending determination of the charge. This is the procedure which we expect to be kept; and when this procedure is not followed and no reason is presented therefor, we can see no reason for proceeding with this hearing, and we are entering a special appearance as a result.

* * *

[16] Mr. Somers: If the Board wishes these figures in this hearing and wishes to continue with the procedures that it is following, it will have to subpoena the books and records of the Company for the commerce information.

[17] Mr. Pyle: Will you comply with the subpoena?

Mr. Somers: I say if the Board wishes to follow the procedure which it is presently following by going ahead with the representation proceeding while the C case is pending, then they will have to subpoena the books and records in order to ascertain jurisdiction.

Mr. Pyle: Will your client comply with the subpoena?

Mr. Somers: I have no knowledge whether they will or won't.

Hearing Officer: Do I understand you to say that the information will be furnished only on the basis of a subpoena, Mr. Somers?

Mr. Somers: Insofar as this proceeding is concerned that is correct.

Hearing Officer: Do you have any witnesses here today to give testimony?

Mr. Somers: No, I do not.

Hearing Officer: Off the record.

(Discussion off the record.)

Hearing Officer: Gentlemen, we will proceed with the hearing; and, prior to the close of the hearing we look forward to receiving the information from the Employer with respect to the business and operations thereof. Mr. Somers, we will proceed with the hearing.

Mr. Somers: I have informed you before of the method of [18] the procedure you will have to follow in order to receive that information concerning the business.

Mr. Pyle: In other words your client will comply with the subpoena.

Mr. Somers: I did not say that. I said you will have to issue a subpoena. I do not know whether they will comply or not.

Mr. Pyle: That is an honest statement, but your prior statement was incorrect. You are not promising anything. You are not telling us anything.

Mr. Somers: I move that the hearing be adjourned until such time as that information is ascertained because I think any other questions with regard to the Employer are premature in view of the fact the Board does not know whether in fact they have jurisdiction over the employer. To get into facts further than that prior to knowing whether they have jurisdiction or not I think is premature.

* * *

[20] Mr. Somers: I haven't been requested to furnish information of commerce by the agent investigating the case.

Hearing Officer: Would you now on request furnish that information?

Mr. Somers: This is part of the charge. This is something that the Board has to ascertain. I don't think that the conduct of the investigation of the CB case is a matter of this hearing.

Hearing Officer: No, I'm not going into any CB facts or factors here.

Mr. Somers: We are willing to proceed in the normal general—

Hearing Officer: I want to know whether your client for whom you filed a CB charge in this office is engaged in commerce within the meaning of the Act with respect to this representation proceeding that is before this Board.

Mr. Somers: Right.

Hearing Officer: That is all I'm asking you. I'm not going to go into the CB case. That will be for the other forum. Now, that's all we are asking at this time. In that connection again would you say that you are not going to furnish that information for the representation proceeding? That's what I'm talking about.

Mr. Somers: I have given you our position as far as fur-

nishing the information in the representation proceeding. [21] Hearing Officer: Namely, that if the information has to be obtained it would have to be obtained through a subpoena.

Mr. Somers: That is correct.

Mr. Pyle: You don't guarantee compliance with the subpoena.

Mr. Somers: I don't know what the Employer will do. All we are asking here, and I repeat this again, is that the proper general policy of the Board be followed and that the CB case be investigated prior to the holding of the representation hearing. That is all that we are asking for here. We are asking the Board to follow the normal procedures and not to make an exception.

* * *

Mr. Somers: Mr. Paone, we filed this charge in all good faith, believing there are violations of employees' rights being engaged in in this plant by people acting for the Union. We don't feel that it is a [22] proper procedure—and to our knowledge we have never seen this procedure followed—whereby the representation hearing is held when there are not only substantial questions of unfair labor practices, but substantial questions going to the showing of interest by the Steelworkers. This charge definitely contains substance which, if proven, definitely would show that the showing of interest is tainted. I can't see—

Hearing Officer: I'm not concerned with the showing of interest in this proceeding. As you well know, Mr. Somers, showing of interest is an administrative matter, and that isn't to be taken up at this proceeding, and it's not litigable here as you well know. I don't have to tell you that, sir.

Mr. Somers: This petition would not stand if there wasn't an administrative determination that the showing of interest was sufficient.

Hearing Officer: That is to be taken up at a different stage.

Mr. Somers: This is evidence going to the administrative decision which I think the Employer should be allowed to present to the Board before it makes the administrative determination.

Hearing Officer: To another forum. Not here.

* * *

[23] Hearing Officer: Again, as I said, I'm going to go forward—

Mr. Somers: I'd like to move that the hearing be adjourned until such time as the jurisdiction is ascertained.

Mr. Pyle: It's already been denied.

Mr. Somers: I haven't heard anything from the Hearing Officer, and I wish you wouldn't interrupt when I'm making remarks.

Hearing Officer: Off the record.

(Discussion off the record.)

Hearing Officer: On the record. The hearing will be in order. The hearing will be in recess until Monday Morning.

* * *

[25] Hearing Room 2007-A
JFK Federal Building
Boston, Massachusetts

Monday, April 8, 1968

* * *

[26] Mr. Somers: Mr. Paone, we are prepared to proceed, but we do wish to reserve our rights to appeal and object to the conduct of the Board in proceeding with this hearing without the completion of the investigation disposable of the unfair labor practice complaint.

As far as the commerce, we will stipulate that the Employer does purchase in excess of \$50,000 worth of goods from out of the Commonwealth of Massachusetts and does ship in excess of \$50,000 worth of goods outside of the Commonwealth of Massachusetts.

Hearing Officer: And the Employer is a Mass. corporation, Mr. Somers?

Mr. Somers: That is correct.

Hearing Officer: Do you so stipulate on behalf of the [27] Petitioner, Mr. Pyle?

Mr. Pyle: I do.

Hearing Officer: The stipulation is received in evidence.

Mr. Pyle: Could you read back the stipulation please.
(Stipulation read back.)

Mr. Pyle: You mean you ship and receive \$50,000 annually?

Mr. Somers: Yes, that's correct.

Mr. Pyle: Thank you.

Hearing Officer: All right, gentlemen, with respect to the question of representation, the file indicates that on or about March 11, 1968, a request for recognition as the bargaining representative was made to the Employer. Can you tell us, Mr. Somers, what the records reflect with respect to such...

Mr. Somers: The demand was made by the Steel Workers.

Hearing Officer: Is it the Employer's position that it at this time declines to recognize the Petitioner as exclusive bargaining agent for the Employees in the unit petitioned for until such time as it or they are determined as such in an appropriate unit determined by the Board?

Mr. Somers: That is our position. Our position was further stated in a letter which was sent to the Steel Workers.

Hearing Officer: You don't have a copy of the letter, Mr. Somers?

Mr. Somers: I don't believe that I do. We are declining [28] to recognize them at this time anyway.

Mr. Pyle: Well, let me advise the Company that the mere fact that the Union has filed a petition here does not

relieve the Company of its duty to recognize the Union as the exclusive bargaining agent of the employees, since the Union has been designated as such by a majority of the employees in an appropriate unit.

Mr. Somers: Mr. Hearing Officer, our position has been stated clearly to the Union.

Hearing Officer: All right, thank you, gentlemen. Do any of the parties contend that there is a contract bar to an election in this case? Mr. Somers, on behalf of the Company?

Mr. Somers: No, sir.

Hearing Officer: Mr. Pyle on behalf of the Petitioner?

Mr. Pyle: No contract bar.

Hearing Officer: Tell me, Mr. Somers, is there any history of collective bargaining involving any of the employees at the plant?

Mr. Somers: Not within the last 15 years.

Hearing Officer: Thank you, sir. With respect to the question of determining an appropriate unit, the petition reads as follows: "All production and Maintenance employees employed at the Employer's plant located at 8 Business Street, Hyde Park, Massachusetts, excluding [29] all office clerical and professional employees, guards and supervisors as defined in the Act.

At the opening of the hearing, my recollection is that the petition was amended to indicate the correct address of the Employer as 98 Business Street, Hyde Park, Massachusetts, right?

Mr. Somers: That's correct.

Mr. Pyle: Right.

Hearing Officer: Mr. Somers, do you stipulate that that is an appropriate description of the unit?

Mr. Somers: No, we believe that the description of the unit is too broad, and there are some questions which we have, and we ourselves are not able to resolve and would

like the Board to resolve as to the exclusions and inclusions of certain individuals.

Hearing Officer: Thank you, sir. You have a witness here today to give testimony with respect to...

Mr. Somers: Yes, I do.

Hearing Officer: All right, have the witness take the stand.

Mr. Pyle: Can we ask, Mr. Hearing Officer, what their position is as to the unit description. I understand he has some problems about inclusions and exclusions.

Hearing Officer: All right, sit down, Mr. Witness for a moment. What is the position, Mr. Somers?

[30] Mr. Somers: We have a question as to the inclusion of employees in the Record Keeping Department.

Hearing Officer: A little bit louder?

Mr. Somers: In the record keeping department. Also the inclusion or exclusion of employees who are in the shipping and receiving area and a truck driver. And with regard to the Products Division, Products Department, it is our position that the assistant foremen should be excluded from the unit.

Mr. Pyle: Who is that?

Mr. Somers: There are four.

Mr. Pyle: Who are they?

Mr. Somers: Ivory Scott, Raymond Zagrafos, George Morris and Alonzo Massey.

Hearing Officer: And the Employer asks that they be excluded on the basis of supervision, is that it?

Mr. Somers: That is correct.

Hearing Officer: All right, is there any others?

Mr. Somers: In addition there is...

Hearing Officer: So we have the problems that you're raising now with respect to the unit, are namely, the record keeping department?

Mr. Somers: Correct.

Hearing Officer: Is number one. And the Employer's position with respect to the department there...

Mr. Somers: We really have no position. We would like [31] the Board to resolve this.

Hearing Officer: And approximately how many employees are in the record keeping department?

Mr. Somers: Four employees.

Hearing Officer: Four, and shipping and receiving area and truck driver?

Mr. Somers: Right. This would be...

Hearing Officer: What's the...

Mr. Somers: This would be four employees in the shipping and receiving and truck driver.

Hearing Officer: Four employees.

Mr. Pyle: Four excluding the truck driver?

Mr. Somers: Including the truck driver.

Hearing Officer: And again, is it the same position?

Mr. Somers: Same position with regards to these people as with the record keeping—no position.

Hearing Officer: And the Products Department you have already stated, those are the problems that we'll take testimony concerning.

Mr. Somers: Right. Insofar as the Products Department, the question is strictly as to the assistant foremen, these four that were named.

Mr. Pyle: Does the Employer agree that a unit of all production and maintenance employees at the Business Street location is an appropriate unit?

[32] Mr. Somers: 98 Business Street, yes.

Hearing Officer: All production and maintenance employees—

Mr. Somers: I think we should put in of Magnesium Casting Co.

Hearing Officer: —of Magnesium Casting Co. at 98

Business Street. And what are your exclusions? No questions concerning the office clerical? They are excluded?

Mr. Somers: Office clericals, professional.

Hearing Officer: Professional employees...

Mr. Somers: Guards, supervisors.

Hearing Officer: —guards, supervisors, as defined in the Act. So that the parties are in agreement as to the unit, namely, all production and maintenance employees of Magnesium Casting Co. located at 98 Business Street, Hyde Park, Massachusetts, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act. That is the general language of the description of the unit, gentlemen?

Mr. Somers: Except that we would like the following the determination of the Board to either specifically include or exclude these employees which we are discussing.

Hearing Officer: Thank you.

* * *

[33]

HARVEY BERMAN

was called as a witness by and on behalf of the Employer and, having been first duly sworn, was examined and testified as follows:

* * *

Hearing Officer: Give the Reporter your name and address?

The Witness: Harvey Berman, 93 Clements Road, Newton, Assistant to the President.

Direct Examination

Q. (By Mr. Somers) Mr. Berman, are you familiar with the operations of Magnesium Casting Co.? A. Yes, I am.

[34] Q. And is one of the departments of Magnesium Casting Co. the products department? A. Yes, it is.

Q. Could you describe for us your responsibility with regard to the products department? A. I have a total control over the products department, and this involves

sales, liaison with sales. I control production, and the line of responsibility from me is to a man named Chet Williams to two foremen named Steinberg, Kabilian to four assistant foremen, named Morris, Massey, Zagrafos and Scott.

Mr. Pyle. Who is the second foreman? How do you spell that?

The Witness: Kabilian, K-a-b-i-l-i-a-n.

Q. (By Mr. Somers) Could you describe for us what is done in the products department? A. The products department takes raw zinc die castings and raw rood molding and manufactures a desk accessory, maybe a pen set, maybe ash trays, etc. Our operations can be broken up into four categories—metal finishing, electro plating, assembly and packaging.

Q. And over these four categories, are there individual assistant foremen? A. Yes, there are.

Q. And who is the assistant foreman for metal finishing? [35] A. Raymond Zagrafos.

Q. And who is the Assistant foreman for Electroplating? A. Ivory Scott.

Q. And for assembly? A. There are two teams of assemblies, one headed by George Morris, and one headed by Alonzo Massey.

Q. And is assembly and packaging actually together? A. It's a simultaneous operation.

Q. Now, with regard to the function of the assistant foreman, addressing ourselves to Ivory Scott, could you describe for us his functions? A. Yes. Ivory Scott's functions are to control the quality and quantity of material being plated. This material being zinc die casting, as I mentioned before. He can fire. He can transfer. He can assign. He may recommend for raises, has done so. He has notified people of raises. He does exclusion analysis, I hope. Makes recommendations with regard to personnel. Attends Management supervisory meetings which are held on a weekly basis.

Q. Who attends these meetings with the assistant... what other assistant foremen? A. The three assistant foremen who are mentioned, in addition to Ivory.

Q. Who else? A. The two foremen, Kabilian and Steinberg, [36] the Assistant Plant Manager, Chet Williams, and I attend them.

Q. Now, could you tell us what's discussed during these meetings? How often are they held? A. These meetings are held on a weekly basis. My attendance has not been as regular as it should have been.

Q. Well, during the times that you have attended these meetings, could you tell us what topics were discussed? A. Well, a wide range of problems, all dealing with actually critiques of the week's work. These involve personnel problems. Who's doing a good job. Who isn't doing a good job. They involve a dialogue between or among foremen, assistant foremen, the Plant Manager and myself as to the quality of each other's job. They involve work load, discussion of work load. They involve production policy with regards to manpower, disciplinary measures that need to be taken.

Q. Has Mr. Scott ever himself recommended a man for discharge or been involved in any proceedings which... A. He was involved with one incident which we are quite happy with. One of his employees, a man named William Washington, decided that he was not going to do a job that—

* * *

[37] Hearing Officer: Whether Scott was involved in what was it, Mr. Somers?

Q. (By Mr. Somers) ... in an action involving discharge? A. Well, according to Scott this happened. The information was relayed at a meeting that Scott told us he threatened to discharge Washington if he did not do the job which was assigned to him. Washington had actually gotten

his coat. He had gotten ready to punch out. Scott had told him if he left, that would be it. The man returned to his job.

[38] At these meetings, we have stressed the authority of the assistant foremen to fire personnel.

Q. Now, with regard to the assigning of work, how does an assistant foreman participate, specifically, Mr. Scott, participate in the assignment of work? A. Well, the operations in the plating room are to be broken up into loading of tanks, unloading, scratch brushing, and Scott will as one operation becomes unnecessary, shift the man from that operation, the loading of tanks, and move him on to scratch brushing as the need occurs. Do you want more detail?

Q. With regard to Scott or any of the other assistant foremen, would they be involved in transferring an employee? A. If he needs more people, or if he doesn't need someone, let's say one of the tanks are shut down, he will notify his supervisor.

Mr. Pyle: You're speaking of Scott now?

The Witness: Pardon me?

Mr. Pyle: You're talking about Scott now?

The Witness: That's what the question was about.

Q. (By Mr. Somers) Are employees interchanged between departments? A. Yes, when you say departments, I think you had better define it. Employees are interchange—
[39] Q. Well, beyond products department? A. Yes. There has been a movement of employees from the Products Department into the M-525 department.

Q. That's a government job? A. Which is a Government job, right.

Q. And how does the rate of pay of Mr. Scott compare with the employees underneath him? A. I'd say between 15 and 40 cents an hour more.

Hearing Officer: What was it?

The Witness: 15 to 40 cents an hour more.

Hearing Officer: Then the...

The Witness: Than the people underneath him.

Q. (By Mr. Somers) Now, you stated that during the Management meetings, there were discussions with regard to manpower requirements? A. Right.

Q. Now, what is the participation of the assistant foremen in such requirements? A. They are our most direct link to our employees. They know whether or not they need more help, and they state if they do—state if they don't.

Q. I see. And what follows their demand? A. An order into the Personnel Office to hire people.

Hearing Officer: And who directs the order into the personnel department?

The Witness: I do.

[40] Hearing Officer: You do. And it comes to you from whom?

The Witness: In the last four weeks, it's been coming directly from Chet Williams to the personnel manager.

Q. (By Mr. Somers) Have any of these assistant foremen recommended raises for other employees? A. Yes. I can't think of a specific instance.

Q. And have these raises been granted? A. Yes.

Mr. Pyle: I object. If he can't think of a specific instance... I move that be stricken, Mr. Judge.

Hearing Officer: The question was do any of them have the authority.

Mr. Somers: Have they in the past recommended...

The Witness: Yes, Ivory Scott has recommended a raise for Donald Noiles.

Q. (By Mr. Somers) And, in fact, what happened? A. He was granted a 10-cent raise.

Hearing Officer: Who made the recommendation?

The Witness: Ivory Scott.

Mr. Pyle: Who was the individual involved?

The Witness: Donald Noiles.

Q. (By Mr. Somers) Now, are there occasions when employees request time off for medical appointments or personal business? [41] A. Yes.

Q. And does the assistant foreman have any authority with regard to granting that time off? A. What he'll do is to carry the message to me sometimes.

Q. If you're not there, what will happen? A. Well, it's either I am there or Chet Williams is there, so that occasion does not occur.

Hearing Officer: What was the answer to that question? If you're not there...

The Witness: Chet Williams is there. The possibilities of being without myself or Chet Williams are very limited.

* * *

[42] Q. Who do they notify they are leaving? A. They notify the assistant foreman.

* * *

[44] Hearing Officer: Approximately how many employees are involved at the entire plant?

The Witness: About 260.

Mr. Pyle: What does that figure include? Everybody in [45] the unit as we have described it?

The Witness: We don't know the unit.

Mr. Somers: Well, the question is as to who is included and who isn't.

Mr. Pyle: Well, you raised the question about a dozen or...

Mr. Somers: Approximately 250 to 260 employees.

Hearing Officer: In the unit that we originally described.

Mr. Pyle: Depending on whether you exclude or include the people in question, is that it?

Mr. Somers: Correct.

Hearing Officer: And run down these departments. Can you tell me who the foremen of these departments are? The die casting department?

The Witness: The general foreman is Mal Emack.

* * *

[46] Hearing Officer: I think it will save time. Mr. Emack is the Dye Department.

The Witness: Now, there are three shift foremen. It's Herbert Davis, Darnell Johnson, Adam Smith. The assistant foremen are Sawyer, Ford and Bill Adams.

Mr. Pyle: And they are what, the—

The Witness: Assistant foremen in die casting.

* * *

[47] Mr. Somers: General foreman, shift foreman, take the position they are excluded. I understand the Union doesn't know whether the assistant foremen are excluded or included, is that correct?

Mr. Pyle: I will have to check.

Hearing Officer: Sir?

Mr. Pyle: To give you a complete answer, I will have to check on it. I know part of the answer, but I will give you a complete answer after I check on it.

[48] Hearing Officer: All right, let's go to the next department?

Mr. Pyle: I'm sorry. What's the Company's position on the assistant foremen?

Hearing Officer: Mr. Somers?

Mr. Somers: On the assistant foremen?

Mr. Pyle: In the dye casting department?

Mr. Somers: Dye casting, they should be excluded.

Mr. Pyle: As supervisors?

Mr. Somers: Yes. What's the Union's position?

Mr. Pyle: I have to check. I told you I have to check. We'll have a conference on it.

* * *

[50] Q. (By Mr. Somers) Do the assistant foremen in plating department—this would be Zagafos and Mr. Scott—do they make out any written reports? Does Mr. Scott

make out any written reports? A. Mr. Scott makes out the reports.

Q. Can you tell us what that is? A. Quality control sheet, which is an attempt to formalize the operations of the plating department and to provide an hourly check on the perimeters that determine plating quality.

Q. And what happens to these reports? A. These reports are checked by the foremen and by me.

Q. And in checking them over, what are you looking for? [51] A. Well, we have only been doing it for about three months, and we haven't got enough hard evidence. We are trying to do it to determine tank solution renewal cycles. It's very technical. What we are looking for actually is some method of predicting quality variance which will permit us to establish some kind of regular procedure to eliminate quality deficiencies.

Q. When you speak of quality deficiencies, you're talking about the performance of the job by the employees? A. And the quality of the equipment, tank exclusions, current densities, various things. And also on a day-to-day basis to do those things which have to be done. For example, maintenance of heaters, maintenance anodes, etc.

Q. In looking at a quality control check list, can you tell from this list where the employees have erred in their performance, if they have? A. Yes, often it's possible to tell.

Q. I'd like to have these marked as Employer's 1(a), (b) and (c). 1(a) is dated 3/18/68. 1(b) is dated 3/19/68, and 1(c) is dated 3/25/68.

(The documents above-referred to were marked Employer's Exhibits 1(a), (b), and (c) for identification.

Hearing Officer: For the record, would you tell us the number of employees in the products department?

[52] Q. (By Mr. Somers) For the record, how many

employees are there in the product department? A. Approximately 30.

Q. I show you what has been marked as 1(a), 1(b) and 1(c). Are these the quality control sheets which you're talking about? A. Yes, they are.

Q. And these, do you recognize the signature on these? A. Yes. It's Ivory Scott's.

Q. And are these filled out on a regular basis now? A. I certainly hope so.

Q. Are they required to be filled out on a day-to-day basis? A. Yes, they are.

Mr. Somers: I'd like to offer 1(a), (b) and (c) in evidence.

Hearing Officer: Any objection to the Employer's introduction of Exhibits 1(a), 1(b) and 1(c)?

Mr. Pyle: No objection.

Mr. Somers: May I ask leave to substitute copies?

Hearing Officer: There being no objection, Employer's 1(a), (b) and (c) are received in evidence. You may substitute copies before the end of the hearing.

(The documents above-referred to, Employer's Exhibits 1(a), 1(b), and 1(c) for identification were received in evidence.)

* * *

[56] Q. Foremen also punch clocks? A. The foremen also punch clocks, including general foremen.

* * *

[60] *Cross Examination*

XQ. (By Mr. Pyle) How long had Ivory Scott been a foreman—I'm sorry, assistant foreman? A. Well, when I came in about six months ago, I revamped the production division. It was more than six months. It was June—9 months now. I revamped that department. And I was introduced to him as the assistant foreman. What his exact duties were prior to the month of June, I can't really assert.

XQ. Was that the first time you were with the Company?
A. No, I have been with the Company as a consultant for the past ten years.

[61] XQ. And what position did you take last June?

A. Assistant to the President.

XQ. That was the first time when you became connected with the production process? A. No, I have run a die casting machine, done a few things.

XQ. What was your position prior to last June? A. I am the father of the son that owns the business.

Mr. Somers: That's the title son of the owner.

* * *

[62] A. My father owns Magnesium Casting Co.

* * *

[64] XQ. (By Mr. Pyle) Now, Mr. Ivory Scott is the assistant foreman, and how many employees does he have under him, so to speak? A. It varies between four and five.

XQ. Does he do any production work himself? A. Yes, he does.

[65] XQ. Would you describe the production work that he does? A. As he directs, he will move material through the cleaning cycle. Sometimes drying. Sometimes loading of tanks when the initial loader is busy setting up the day's work.

XQ. Does he have occasion to do any other work? A. Not to my knowledge. I think on Friday's he does do some maintenance work. He directs Don Noiles and a man by the name of Nocero in the filtering of solutions.

XQ. Donald Noise? A. Noiles.

XQ. N-o-i-l-e-s? A. Right.

XQ. And these two are employees who have something to do with filtering solutions? A. Yes.

XQ. What other employees do you claim he directs?

A. William Washington, and another man who we don't have at the present. We are short-handed.

XQ. So at the present time, you claim he directs three employees? A. Right.

XQ. And would you describe the area in which these employees work or what's the name of the area? A. Plating room. It's a room separated from metal finishing and polishing by walls. It's a different [66] ventilation system. Entrance to the room is provided by two doors. One into a vestibule. The other into the metal polishing and finishing area.

XQ. Now, Scott's pay is what, Mr. Berman? A. Scott's pay is between 15 and 40 cents more...

XQ. Well, what's the pay per hour?

Mr. Somers: Do you know his pay per hour?

The Witness: \$2.35 an hour.

XQ. And there is another employee who makes 15 cents less? A. Yes.

XQ. And that's which, Noiles or Nocero? A. I imagine both of them make 15 cents less. One makes probably 25 cents less. A new employee would come in at a dollar 80.

XQ. And this is some kind of a progression after a \$1.80? A. Yes, there is.

* * *

[68] XQ. (By Mr. Pyle) What's the progression? A. \$1.80, \$1.85, \$1.90, \$1.95—one month, three months, six months.

XQ. All right. Now, you indicated that one of the—I'm sorry. Is that the end of the progression? A. Yes.

XQ. \$1.95? A. Right.

XQ. How does an employee make— A. On the merit basis.

XQ. I see. Beyond that it's on merit? A. Right.

XQ. Up to what figure?

Mr. Somers: Objection.

Hearing Officer: I will allow the question.

Mr. Somers: As to which kind of employee which classification?

Mr. Pyle: Well, any of the employees in the little group here.

Mr. Somers: In metal plating?

Mr. Pyle: Yes, in the plating room, that plating room that we're talking about.

The Witness: Do you include Ivory Scott?

Mr. Pyle: Yes.

[69] The Witness: I don't know. I haven't got a top figure for Ivory Scott.

XQ. (By Mr. Pyle) How about for the other employees—
A. I don't know. I think \$2.25, \$2.30. Look, I think it's a ridiculous question. Next year I'll give you a different answer.

XQ. In other words, you have no fixed maximum?

Mr. Somers: This is a merit system.

Mr. Pyle: Some merit systems have...

Mr. Somers: It doesn't necessarily require a fixed amount as a maximum.

Mr. Pyle: Some have a ceiling and some have no ceiling.

XQ. (By Mr. Pyle) Does your merit system have a ceiling? A. It has no ceiling.

Mr. Somers: They can earn up to \$4 an hour.

XQ. (By Mr. Pyle) So if these employees merited they could make more than Scott? A. I beg your pardon?

XQ. If these employees merit is sufficient, they can be paid more than Scott, is that right? A. No.

XQ. Then the ceiling is Scott's wage? A. I don't know what Scott's wage is—what the limit is. I mean, you're dealing with relevants here, which move, which I am sure you are aware of.

XQ. Well, let me put it this way. There is no limit as to how [70] high Scott can go that you know about, and

there is no limit as far as the others are concerned. A. Yes, there is a limit.

XQ. Well, is that the policy which is written somewhere?
A. No, that's my policy.

XQ. Have you ever expressed it before?

Mr. Somers: Objection.

Hearing Officer: I will allow the question.

XQ. Have you ever expressed that before? A. To whom?

XQ. To anybody? A. Chester Williams. We always try to keep our foremen 15 or 20 cents higher.

XQ. That's what you call an assistant foreman? A. Depending on length of service it may be considerably more.

XQ. Now, in terms of the production work Mr. Scott does, is there any work that he does which is not done by Noiles or Nocero or Washington? A. Yes, considerable.

XQ. What work does he do above and beyond what those three do? A. Quality. Attends Management meetings.

XQ. No, I am talking about production. A. No, the things he does are supervisory—the things that are different.

[71] XQ. So, in other words, insofar as the actual production work is concerned, his work covers the same duties as Noiles or Nocero or Washington? A. When he's on production, he can do the same jobs. He does not necessarily do the same jobs though. It would depend very much on how he sees his needs at the moment.

Hearing Officer: How often you said when he's on production, how often is he on production?

The Witness: I can't estimate that.

XQ. (By Mr. Pyle) All right, now, apart from the production work that the other employees do, you have told us that Mr. Scott fills out these quality reports? A. Yes.

XQ. Does he fill them out himself? A. Of course.

XQ. And he completes them daily or hourly or more frequently? A. Well, he checks them off. If you look at the

list, you'll see there's a space for hourly checks, and he's expected to make an hourly check.

XQ. And in making these checks, he observes the quality of the products, is that correct? A. Correct.

[72] XQ. Takes care of anything else in making these reports, other than quality of the product? A. Well, he's observing everything in the room.

XQ. The ceiling? A. Yes.

XQ. The floor? A. Yes, as a matter of fact.

XQ. Walls? A. I hope so.

XQ. Now, apart from these quality reports, what else does Mr. Scott do as a regular procedure? A. He does the initial make-ready.

XQ. Do the other employees ever do the initial make-ready? A. No.

Hearing Officer: What's the initial make-ready?

The Witness: Well, he takes temperatures, makes sure that his solutions are up to temperature. He will pull a chemical analysis of the solution once a day. This is not a make-ready. This is part of the checking that goes on. He may do this at the end of the day, whenever he finds the convenient time.

XQ. (By Mr. Pyle) Do any of the other employees ever do that chemical analysis? A. My general foremen. Sometimes my plant manager, assistant plant manager. We try to have it done as frequently as possible. In addition, he takes a PH reading, which indicates the [73] acidity, as you probably know from high school chemistry, of the solution. He attends meetings, assigns work.

XQ. He assigns work within the? A. Within the place.

XQ. Within this room? A. Yes. There are actually two rooms. There is a room where they plate gold.

XQ. Real gold? A. Unfortunately no.

XQ. Unfortunate for whom? A. I'd like to be in that business. No, it looks like gold.

XQ. All right. Now, you testified that Scott does the initial make-ready and chemical analysis and takes a PH reading, and that the other employees in the department do not do these jobs? A. Right, and then he assigns these employees for the day and on an hour-to-hour, minute-to-minute basis during the day as the work load shifts.

XQ. Well, is the initial make-ready of the solutions work that the other employees wouldn't be qualified to do? A. They may do it with direction from Scott or adding a new cleaner. If they do so, they would do it under his control.

[74] XQ. That work has to be done carefully, I take it? A. Yes.

XQ. And if you know how to do that, the initial make-ready of the solution, you are a more valuable production employee? A. Right. More valuable as a supervisor, too.

XQ. Now, you state that Mr. Scott can fire an employee? A. Right.

XQ. Has he ever done it? A. He—

XQ. Has he ever fired an employee? A. No, he has not.

XQ. I see. But you claim he has the authority to fire? A. Yes.

XQ. And he has the authority to fire, and that's unreviewable? A. It is unreviewable, yes.

XQ. So he could keep a totally incompetent employee in the department if he wanted to? A. I didn't say that. He could discharge on an unreviewable basis. If we saw somebody was totally incompetent, my other assistant foreman might fire him.

XQ. So he's not the only with with the authority to discharge in his department? A. No, the other supervisors as well.

Hearing Officer: He takes it up with whom first?

The Witness: He need not.

[75] Mr. Pyle: We're talking about something that's never happened, Frank.

Mr. Somers: Well, there has been an incident here, and the record will show it, which would have resulted in discharge had certain conduct not been followed by the employee.

XQ. (By Mr. Pyle) Now, you state that Mr. Scott has the authority to transfer? A. Yes. If...

XQ. From where to where? A. He can transfer into the metal polishing department. And he can request and pull people from the metal finishing department.

XQ. You mean if he needs additional help? A. He can tell the other assistant foremen that he needs somebody. Between the two of them, they will work out something.

XQ. So if the other assistant foreman agrees, then an employee is transferred from one area to another? Is that right? A. Yes.

XQ. So that he can't transfer all by himself. He's got to have the agreement of the other... A. If he had too much work, he could just send somebody out to the other assistant foreman. Let's say one [76] of the tanks shut down.

XQ. All right, but the employee couldn't begin work in the other area until the other assistant foreman approved? A. Until the other assistant foreman assigned him to a job.

XQ. Now, you testified that he can assign? By that you mean he tells the employees in the department— A. Which job to do.

XQ. What job to do? So that he does not assign work outside of his own room? A. No.

XQ. He doesn't assign work outside of the three employees that are in there? A. Right. You know, I still want to emphasize the two-room deal.

XQ. Yes, the gold room. Now, in this incident with Wil-

liam Washington, how long ago did that take place? A. Oh, within the last six months.

XQ. You mean about six months ago? A. Within the last six months. I can't give you a date.

XQ. Well, yesterday was within the last six months. A. Right.

Hearing Officer: Approximately what's your best estimate?

The Witness: Three or four months ago.

[77] XQ. (By Mr. Pyle) Now, you testified that Scott reported to you that Washington was about to leave the department? A. No, it didn't happen that way. I was informed of this at a supervisor's meeting.

XQ. You were informed about it by Scott? And what did Scott say? A. Washington had— He assigned Washington a job. Washington refused to do it. Got his coat. Scott said if you leave, don't come back. Washington decided that he would stay.

XQ. Was the Company policy that if an employee leaves work, he's discharged? A. Not necessarily. It's happened several times, as a matter of fact.

XQ. You mean, an employee could go without being discharged under certain circumstances? A. Yes, it happened many times.

XQ. Have you had employees go home for a day or two without being discharged because they didn't want to do the work? A. Yes.— no, for various reasons.

XQ. Well, let's take an employee who refuses to work and leaves the plant. Have there been any such cases where you failed to discharge that employee? A. Yes, several—many—as a matter of fact. We have a shortage of help.

[78] XQ. Why is that? A. Why is that? Because we have a war. Not many young people showing up.

XQ. You testified Scott recommended raise for . . . A. Noiles.

XQ. Noiles. How long ago was that? A. I think within the last month.

XQ. After the petition was filed? A. I haven't the vaguest idea. I don't see as it is related.

XQ. Well, let's assume it's unrelated. Was it before or after the petition? A. I don't know.

Mr. Somers: Objection. I don't see the relevancy of the question.

XQ. But you do testify that it was within the last month? A. Perhaps. I mean, I'd have to go back in my records.

Mr. Somers: I had an objection to that question. I haven't heard a ruling.

Hearing Officer: The objection is overruled. If the witness can give an answer...

The Witness: I can't give exactly when. I can supply it later.

Hearing Officer: Can you give an approximate date at this time?

[79] The Witness: I did. About a month.

XQ. (By Mr. Pyle) Well, do you know at the present time whether it was before or after the petition was filed? A. No, I don't know.

* * *

[86] XQ. (By Mr. Pyle) Mr. Berman, do your foremen receive any fringe benefits the rank and file employees do not? A. Some of my foremen do.

XQ. What are those fringe benefits that some of the foremen receive? A. There is a pension plan, including some kind of major medical, health insurance.

XQ. Master medical? A. Yes.

XQ. Some of your foremen then enjoy master medical coverage? A. Some do.

XQ. Do the assistant foremen enjoy master medical coverage? A. No, they don't.

XQ. Now, on the pension plan, do the rank and file employees have a pension plan? A. No, they don't.

XQ. Do the supervisors have a pension plan? A. Yes, they do some of them.

XQ. Do the assistant foremen, are they covered by that pension plan? A. They are not.

* * *

[87] XQ. (By Mr. Pyle) All right, some of your foremen do enjoy but the assistant foremen don't? A. Some of my foremen don't.

XQ. Do you know why the foremen don't...

Mr. Somers: Objection. I don't think that's relevant why they don't and why they do.

Hearing Officer: I will allow the question.

The Witness: There are various standards which determine...

XQ. Earning level? A. No, not necessarily.

XQ. Is that one of the standards? A. I beg your pardon?

XQ. Is that one of the standards? A. I don't believe so.

XQ. Is the number of employees he supervises one of the standards? A. I don't believe so.

XQ. What are the standards?

[88] Mr. Somers: Objection.

Hearing Officer: If he knows. All right, I will allow the question, if he knows.

The Witness: I really can't tell you. There are not definite things that have been established.

Hearing Officer: Did you say the foremen were covered by the pension plan?

The Witness: Some of them. And there are some foremen that are not covered.

* * *

[90] XQ. (By Mr. Pyle) Is there any difference between the vacation plan covering foremen and that covering rank and file employees? A. None.

XQ. How about the assistant foremen? A. No, there is no difference.

Mr. Pyle: Everyone in the same place gets the same—
Hearing Officer: Gets the same vacation?

Mr. Pyle: So that doesn't cut one way or the other.

Hearing Officer: Do you have holiday...

The Witness: Yes, and the same applies for holidays.

Hearing Officer: Foremen, assistant foremen and rank and file employees?

The Witness: Correct.

[91] XQ. (By Mr. Pyle) All receive the same benefits?
A. Right.

XQ. How about, do you have any different insurance plan? A. That's part of this— The plan that I have is a comprehensive plan. I can't give you any of the details. If you wish, we can provide you with the details.

XQ. Will you check with your lawyer to see if he sees fit—

Mr. Somers: Well, I think the question is how does it differ between foremen and assistant foremen, Management, production and maintenance. I don't know that the specific benefits are important. The question being whether the plans differ. Wouldn't you say? So, I mean...

Mr. Pyle: We welcome all the information we can get.

Mr. Somers: Yes, well, I don't know, do you know, if they differ?

The Witness: There is only one plan. And some of the foremen get it.

Mr. Somers: And some don't.

The Witness: That's right. That's right.

Hearing Officer: Did I hear you say some receive—

Mr. Somers: Some receive.

Hearing Officer: Some receive the coverage and some don't?

[92] Mr. Somers: Right.

Hearing Officer: And how about as far as the coverage for the assistant foremen?

The Witness: There is no coverage for the assistant foremen.

Hearing Officer: And the rank and file employees, there's no coverage for the rank and file employees?

Proceed, Mr. Pyle.

XQ. (By Mr. Pyle) So that we would be a little more accurate to say that you have what you understand is the pension plan and some life insurance and medical insurance, and that all of these features are provided for some foremen... A. And not to others.

XQ. And not to other foremen. And not to any assistant foremen? A. Correct.

XQ. And not to any rank and file employee, right? A. Right.

XQ. Are your foremen hourly paid? A. Yes, they are.

XQ. Your foremen punch a time clock? A. Yes, they do.

XQ. Now, in the products department to what foremen does [93] Mr. Scott report? A. Charles Kabilian.

XQ. And is Mr. Kabilian the foreman whose jurisdiction includes electroplating? A. Yes, and metal finishing and polishing.

XQ. Now, you have told us that there are four employees in electroplating including Mr. Scott at the present time. How many employees are there in metal finishing and polishing? A. Five or six, including the assistant foreman.

XQ. So that Kabilian has a total seven—ten employees working under him at the present time? A. Plus one or two more people. Sometimes three and four people to move materials to do janitorial work in the area.

XQ. In other words, he supervises them when they are in his area? A. No, their work applies specifically to his area.

XQ. All right. Do they regularly work for him? A. Yes.

XQ. So you would say that Kabilian has between 10 and 12 employees working under his supervision? A. I would say that, yes.

XQ. And one of them is Mr. Scott and another is Mr. Zagrafos? Okay. Now, working with Scott you have three others, right now. And— A. Working for Scott.

* * *

[94] XQ. And then there are two other employees under Kabilian who are not within the jurisdiction of Scott or Zagrafos? A. No, no, they all are. If, for example, either Zagrafos or Scott wants something moved, they can tell this one person in particular, Constantine Malinowski—

* * *

[95] XQ. How many employees under the jurisdiction of Mr. Steinberg? A. Ten, 12.

XQ. Is that a typical or average number of employees that are under the jurisdiction of a foreman, 10 or 12? A. It's an average in my place—in the products division. And each assistant foreman has four to five. Sometimes more. Sometimes less.

* * *

[97] XQ. And is it customary in giving—whether to give somebody a raise in the electroplating area that you would consult Kabilian? A. I think I would consult either Kabilian or Scott, depending on whoever I saw first in the shop. I have no set policy on it.

* * *

XQ. So that you would give a raise if either the assistant foreman or the foreman recommended it? A. I have done so.

XQ. You would make your own independent investigation? A. Sometimes. Sometimes not.

[98] XQ. I think you said Scott recommended a couple of employees for an increase, didn't you? A. Noiles.

XQ. And did you ask Kabilian's opinion? A. I think he said yes.

XQ. And what was your opinion? A. Yes.

XQ. Did you investigate it independently the opinion of the foreman and the assistant foreman? A. No.

* * *

XQ. (By Mr. Pyle) Would you expect your assistant foreman in the products area to bring their disciplinary problems to the attention of the foreman? A. No, not necessarily.

* * *

XQ. You never suspended people? Do you ever fire people? A. Yes.

XQ. And would the assistant foremen bring that to the attention of the foremen before taking any action? A. Not necessarily.

XQ. Do you know of any assistant foreman who's done it entirely on his own without consulting his foreman? A. I don't know of anybody [99] who's been fired, with one exception.

XQ. Oh, I see. What was the exception? Where was that, in what area? A. It was in plating. No, it wasn't in plating. It was in metal finishing.

XQ. That's the only person who's been fired since you have been with the plant since last June? A. No, I know of one case where the assistant foreman did fire.

XQ. Without consulting anybody? A. He said he was going to do it, and I said good.

XQ. Oh, he cleared it with you first? A. I said he was going to do it.

XQ. And you agreed? A. I said "good."

XQ. Indicating agreement? A. I said "good."

* * *

[100] XQ. (By Mr. Pyle) Just so the record is clear, I understand that you have never suspended people since

last June, and you have had only one discharge case?
 A. No, more than one. I told you the second one I thought of. The person discharged was a man by the name of Frank Angrasio.

XQ. All right, but two discharges? A. Yes.

XQ. Does Mr. Kabilian work in the area where Mr. Scott and Mr. Zagrafos do their work? Does he work in the same general area? A. In the same general area.

* * *

[101] XQ. (By Mr. Pyle) Is the foremen paid more than the assistant foremen? A. Yes.

XQ. How much more an hour? A. 60 cents more an hour.

Mr. Somers: We're talking about all the assistant foremen?

Mr. Pyle: No, I am talking about this—

(Discussion off the record.)

Hearing Officer: So that Massey and Morris, the differential between them and Steinberg is what, what did you say was the figure?

The Witness: 85, 85, 90. I'm not exactly sure. All the assistant foremen get the same rate.

XQ. (By Mr. Pyle) They all get \$2.35? A. All the assistant foremen get the same rate.

XQ. Plant-wise you mean? A. No, in the products division. In die casting they get more.

XQ. Now, has Mr. Zagrafos ever fired anybody? A. Yes, he has.

XQ. Who's that? A. I told you, Mr. Angrasio.

* * *

[102] Has he ever hired anybody? A. No, the personnel department hires people.

XQ. All hiring is done in the personnel department?
 A. Yes, with interviews by our assistant foremen and the teaching by assistant foremen after they are hired.

XQ. That's one of the jobs, the assistant foreman is to instruct and teach the employee? A. Correct.

XQ. Is the assistant foreman normally the most experienced employee in a particular area? A. No, not necessarily.

* * *

Hearing Officer: The assistant foremen get paid for overtime?

The Witness: Yes.

Hearing Officer: Is there any difference in dress between [103] the assistant foremen and the other employees in that department?

The Witness: Well, upstairs there is a difference between them because the—

Hearing Officer: I am talking about Scott, Morris, Zagrafos, and Massey.

The Witness: Upstairs the assistant foremen are men, and the work is not very messy, and their dress is pretty much like street clothes—not like die casting dress. The girls though happen to wear work clothes upstairs. The fellows downstairs have work clothes, and well, Scott usually dresses very well and keeps himself very neat. So he dresses on an average better than any of the people working for him. Zagrafos I would say dresses pretty much the same as the people whom he directs.

XQ. (By Mr. Pyle) Would you say that Scott has a thorough knowledge of all the operations in the plating department? A. Yes, I would.

XQ. Is that a prerequisite for the job of assistant foreman in the plating department? A. Yes, he has been sent to school to learn the job. He knows the job better than I do. He knows it better than my foremen I might add.

XQ. In other words, you would have to have a thorough knowledge in order to train the new employees? A. Yes.

In order to run a [104] department, you have to have a thorough knowledge.

Hearing Officer: Assistant foremen Massey and Morris also work in their department?

The Witness: Not as much as Scott.

Hearing Officer: How much does Morris work?

The Witness: It's a very hard question to answer. The majority of their time is spent keeping the line flowing, checking for quality, making sure that operations are being done properly; and this is more true of Zagrafos and Morris than it is of Scott. His responsibilities are continually watching the quality of his work which means not working a substantial portion of his time in order to check out the quality to see what's happening to try to fix whatever is going wrong. I would say that neither Massey or Morris do very much work physical work. And I would say Zagrafos does exceptionally little, except on a fill-in basis.

* * *

[115] *Redirect Examination*

Q. (By Mr. Somers) * * *

[116] Q. Does the foreman you described do some of the assistant foremens' functions in doing the initial make-ready, chemical analysis, taking a PH reading in addition to their attending meetings and designing work, does the foreman participate also in the initial make-ready and chemical analysis? A. Yes, the foremen can.

Q. Now, you stated that some foremen receive certain benefits and some foremen do not. Is this determined by the length of service basically? A. More or less. It's not the criteria.

Q. How does the foreman dress compare with that of the assistant foreman? A. Very much the same.

Q. Now, you stated that Mr. Scott was sent to school.

[117] Was this at the Company's expense? A. Yes.

Q. And do you recall for what period of time? A. No, I don't.

Q. And was this in what area was this school, in plating?
A. It was in plating, electroplating.

Q. And this was in order to train him in all of the operations of the plating department, is that correct?
A. Correct.

Q. And this training would assist him in his responsibilities? A. Correct.

* * *

[118] Hearing Officer: Tell me for the record again all the assistant foremen, if I understood you correctly, receive \$2.35 an hour?

The Witness: Correct.

Hearing Officer: And the range rate between Scott, \$2.35, and the employees that are working with him was what?

The Witness: I think the closest one is 15 cents.

Hearing Officer: 15 cents?

The Witness: And it could go down to \$1.80, which is 55 cents.

Hearing Officer: And with respect to Zagrafos...

[119] The Witness: That's the same.

Hearing Officer: It would be the same.

The Witness: The closest one to him... I'm not sure... I would imagine it's ten or 15 cents.

Hearing Officer: And with George Morris?

The Witness: The closest one to him is probably 25 or 30 cents.

And the same thing goes for Alonzo.

Hearing Officer: The same 25?

The Witness: 25, 30 cents.

Hearing Officer: Who determines the quantity that is to go through the departments, Mr. Berman?

The Witness: I would say that the foreman does.

Hearing Officer: The foreman does.

The Witness: He's placed in charge of placing the work in the room, and then it's up to the assistant foreman to be able to get it through or to try to get it through.

Hearing Officer: So that the foreman will place in the room X number of items that are to go through this week or this day?

The Witness: No, it doesn't work that way. For instance, we prepare a very large batch of material, and the foreman is the one who does the preparing. The assistant foreman then can choose [120] the plating room, for example, this material is racked up after having gone through various operations in metal polishing. The foreman can then choose the work he wants to place in the tanks from the racks.

Hearing Officer: I see. Then the assistant foreman picks it up from there?

The Witness: Correct.

Hearing Officer: Have you had any layoffs out there in the plant?

The Witness: No.

Hearing Officer: Since you have been there?

The Witness: None.

* * *

Hearing Officer: The witness is excused.

Excuse me just one moment. Who is the assistant foreman in the die casting department?

The Witness: Obedia Ford, Norman Sawyer and Bill Adams.

* * *

[121]

OBEDIA FORD

was called as a witness by and on behalf of the Petitioner and, having been first duly sworn, was examined and testified as follows:

Hearing Officer: Give the reporter your name, sir?

The Witness: Obedia Ford.

Direct Examination

Q. (By Mr. Pyle) And your address? A. 10 Hartwell, Dorchester, Massachusetts.

Q. And you are employed at the Company? A. Magnesium Casting Co.

Q. How long have you worked with the Company? A. Four years.

[122] Q. In what department do you work in? A. Die casting department.

Q. Do you have some kind of a title there? A. Assistant foreman.

Q. I believe there are two other assistant foremen in the die casting department? A. Correct.

Q. Mr. Sawyer? A. Right.

Q. And Mr. Adams? A. Right.

Q. And who is the general foreman of the department? Is that Mr. Emack? A. Malcolm Emack is the general foreman.

Q. And I think there are three shift foremen, is that correct? A. Correct.

Q. One for the morning, one for the afternoon and one for the night shift? A. Well, the afternoon shift and the day shift rotates, so you can call it two for the rotation shift and one for the night shift.

Q. Thank you. Now, what's your work in the die casting department? A. I am a machine operator permanently.

[123] Q. What kind of a machine do you operate? A. Die casting machine.

Q. How many die casting machine operators are there on your shift? A. It varies from five to seven or five to eight, I would say.

Q. And is your work any different from the work of the other die casting machine operators? A. No.

Q. Do you ever hire anybody? A. No.

Q. Ever fire anybody? A. No.

Q. Ever suspend anybody? A. No.

Q. Ever recommend anybody be fired? A. No.

Q. Ever recommended anybody be suspended? A. No.

Q. Ever recommend anybody get a wage increase? A. No.

Q. Ever recommend that anybody get a promotion? A. No.

Q. Ever transfer anybody? A. No, I have not.

[124] Q. When the foreman of the department is on vacation, do you take his place? A. Yes, I do.

Q. And who is that? A. Herbert Davis.

Mr. Pyle: Thank you. No further questions.

Hearing Officer: You take whose place?

The Witness: Herbert Davis.

Hearing Officer: How long is that period of time you fill in for Herbert Davis?

The Witness: Two weeks vacation.

Hearing Officer: What's your salary?

The Witness: \$2.55 per hour.

Q. (By Mr. Pyle) And what's the salary of the other machine operators? A. The one next to me is a Class A operator, \$2.45.

Q. Are you a Class A operator? A. Yes, I am.

Hearing Officer: The die casting operator gets \$2.45?

The Witness: Right, the Class A operator.

Mr. Pyle: That's all.

Cross Examination

XQ. (By Mr. Somers) Mr. Ford, how long have you been a die [125] caster not only for Magnesium but for other companies? A. At Magnesium, that's the only place I have been a die caster.

XQ. Is at Magnesium? A. Magnesium.

XQ. And how does your work differ from other die casters? A. Primarily it doesn't differ. I set up a machine, etc.

XQ. Is your machine different at all from other die casters? A. No, it is not.

XQ. Is your work any different? A. No.

XQ. You do set up work? A. Yes, I do.

XQ. You do all the other— Do all the other die casters set up work? A. The die casters who have experience.

XQ. Do you train? A. I used to train, but not any more.

XQ. How many of the other die casters do set-up work? A. Oh, on my shift I would say four.

XQ. And how many die casters are there on your shift? A. Well, it varies from five to eight.

Hearing Officer: Anybody ever tell you you were a supervisor?

The Witness: No.

XQ. (By Mr. Somers) What were you told when you ran the [126] shift when Davis was out? A. When I ran the shift when Davis was out?

XQ. Right. A. I wasn't given any specific statement. I wasn't given any kind of specific statement what to do. I mean, I was told I was an assistant foreman to take charge when the foreman was absent, and that's primarily what I do.

XQ. Now, has the foreman been absent on any occasion besides these two weeks? A. Yes, sick.

XQ. I see, and did you take over that time? A. Yes, I did.

XQ. And how much training do you do in a normal week when you have a new employee in your department on your shift?

Mr. Pyel: He says he doesn't do it any more.

A. I don't train anymore.

XQ. Have there been any new employees hired recently in your department on your shift? A. When, last week or ...

XQ. Well, within the last couple of months? A. Yes.

XQ. Can you recall who trained them? A. I would say

either Malcem Emaek or Donald Johnson or Herbie Davis.

XQ. And all three of those men are foremen, is that correct? [127] A. Correct.

XQ. Do you know why you're not training any more?
A. No, I was never told.

XQ. Do you receive a special rate— I will withdraw that.

Hearing Officer: Who did you say the foreman was, Mr. Ford?

The Witness: The foremen that train? Herbie Davis.

Hearing Officer: And how long has Davis been out sick?

The Witness: Oh, within the last three months, he's been out maybe a month.

XQ. (By Mr. Somers) Are you familiar at all with the assistant foreman's job in the products division? A. No.

Mr. Somers: I have nothing further.

Mr. Pyle: That's all.

Hearing Officer: Did you ever recommend anyone for an increase?

The Witness: No.

Hearing Officer: Did you ever discipline any employees while you were there?

The Witness: No.

Hearing Officer: Do you attend the Management meetings?

The Witness: No.

XQ. (By Mr. Somers) Are you responsible in any way to [128] Mr. Harvey Berman? A. No, I am not.

Hearing Officer: What benefits do you receive, Mr. Ford?

The Witness: Well, vacation, holiday, and that's it, as a regular employee would.

Hearing Officer: All right, do you have any questions, Mr. Pyle?

Mr. Pyle: No.

XQ. (By Mr. Somers) Do you get Blue Cross-Blue

Shield? A. Recently for a month. It came out about a month ago.

XQ. And...

Hearing Officer: Do the other employees receive those same benefits?

The Witness: Yes, other employees receive those same benefits.

* * *

[134] Hearing Room 2007-C
JFK Federal Building
Boston, Massachusetts

Friday, April 12, 1968

* * *

[136] ALONZO MASSEY

was called as a witness by and on behalf of the Petitioner and, having been first duly sworn, was examined and testified as follows:

Hearing Officer: Give your name?

The Witness: Alonzo Massey.

Hearing Officer: Are you employed at Magnesium Casting?

The Witness: Yes, sir.

Direct Examination

Q. (By Mr. Pyle) What is your address? A. 108 Homestead Street, Dorchester.

[137] Q. How long have you been employed at Magnesium Casting Co.? A. 14 months.

Q. And what's your title at the Company? A. As a floor boy.

Q. Floor boy? A. Yes.

Q. Are you also called an assistant foreman? A. To my knowledge.

Mr. Somers: What's your answer?

Mr. Pyle: To his knowledge.

The Witness: To my knowledge.

Hearing Officer: To your knowledge what? What is it to your knowledge, yes or no?

The Witness: No.

Q. (By Mr. Pyle) Does the Company refer to you as an assistant foreman? A. Yes, they do.

Q. Now, in what area of the plant do your work? A. I am on the first floor, the metal line.

Q. Tell the Hearing Officer what kind of work is done in the area where you work? A. What kind of work?

Q. Right. What's the operation. A. Oh, it's all metal, but there are different items.

[138] Q. And what did you do to them in the area where you work? A. I keep the women supplied, and I make sure they are done correctly. If there are any rejects, I take them apart and put them back in the reject case.

Q. All right. Now, which floor of the plant do you work?

Mr. Somers: Objection. Asked and answered.

Hearing Officer: I will allow the question.

Q. (By Mr. Pyle) Tell us again which floor of the plant you work? A. First floor.

Q. And how many other employees work in the same area the first floor where you do? A. There's six as a group. But sometimes I have three or four. They rotate.

Q. In other words, some employees work in your area sometimes, and sometimes they work in Mr. Morris's area? A. Yes.

Q. Now, when the girls or the other employees are working in your area, what are they doing? What job are they doing? A. One assembly and one metal and one pack and sometimes plate.

Hearing Officer: And what items are they assembling?

[139] The Witness: Oh, it would be book ends or calendars, you know, cards, and pen sets, desk pads, and all that.

Hearing Officer: And then they go where do they go from there, to the packer?

The Witness: Yes, first you assemble, you put the pen wheel on first. Then the next girl puts the metal on, and then the next one puts it in the box and puts the label on the box and puts it on a master box.

Q. (By Mr. Pyle) And what work do you perform? A. I keep them supplied, and if they need felt, I give her felt. If one of them have trouble, I am supposed to be there, you know, to try to correct and all that. And I keep checking back and forth on the different girl and make sure she's doing it right.

Hearing Officer: What type of employees have you, male or female?

The Witness: Female.

Hearing Officer: Female assembler and female packer?

The Witness: Right.

Hearing Officer: And what do you do actually? I mean what type of work do you do, if any?

The Witness: I keep them supplied.

Hearing Officer: You just keep them supplied?

The Witness: And I keep checking on them. One day she might pack, and the box would be too heavy for her to move. One girl might run out of felt. She might need glue into the machine. The can [140] is too heavy for her to lift and put the glue in.

Hearing Officer: How are you paid?

The Witness: \$2.35 an hour.

Q. (By Mr. Pyle) Now, aside from supplying the other employees with whatever they need, do you do any work by yourself? A. What do you mean?

Q. When you're not supplying the girls or when you're not moving something for them, do you do any of this packaging or assembly yourself? A. Sometime I might pack.

Q. Now, how long have you been called an assistant

foreman? A. I think about six months. I am not too sure.

Q. Was there any assistant foreman in the area before you were made the assistant foreman? A. Yes, one.

Q. Who was that? A. George Morris.

* * *

[141] Q. (By Mr. Pyle) Now, when you were made assistant foreman, did you get a pay increase? A. Yes, I did.

Q. How much? A. A dime.

Q. Now, since you have been assistant foreman, have you ever fired anybody? A. No, never.

Q. Have you ever suspended anybody? A. No.

Q. Have you ever recommended anybody for a wage increase? [142] A. No.

Q. Have you ever hired anybody? A. No, never.

Q. Now, who makes the work assignments in your area? A. Benny Steinberg.

Q. And how does he do that? A. He puts a poster on the wall every night before the girls go home.

Q. And what does the poster say? A. He puts the number of the item and which operation the different girl is supposed to do. Like at first he has the number of the item 1, assembly, and have a name aside it. The next one felt with her name aside of it. The next one packing with her name aside of it. The morning comes, she goes and does the job, and I am supposed to have the supplies ready.

Q. Does Mr. Steinberg observe you and the other employees working? A. Yes, he does.

Q. How often does he do that? A. About five or ten minutes.

Q. Every five or ten minutes? A. Yes.

Q. Does he watch your work? A. Yes, he does.

[143] Q. Just like the other employees? A. That's right.

Q. Now, if one of the employees in your area wants to leave the plant, who does she talk to? A. Well, sometimes she may tell me, and I will go to Benny Steinberg first and

see what he has to say. Then I have to go back to her and tell her.

Q. Do you instruct any employees on how to do the job?

A. Yes.

Q. And if an employee does the job incorrectly, what do you do? A. Well, I am supposed to correct her on it, and then I will go back to Benny to tell him that she's doing the job improperly and maybe switch her to another job that will be maybe more easier for her.

Q. If Steinberg sees one of the girls doing an operation wrong, does he correct them? A. Yes, he does.

Q. Now, when you run out of work in your area, does Mr. Steinberg assign you to do some other work?

Mr. Somers: Leading. Objection.

Hearing Officer: I will allow the question.

Mr. Somers: Why doesn't he ask what happens when he runs out of work in his area.

Hearing Officer: I said I will allow the question.

Q. (By Mr. Pyle) When you run out of work in your area, [144] what happens? A. When I run out of work, sometimes they go on another floor and do some work or some other odd job may have to be done, and I have to do that.

Q. Who assigns you to that other work? A. Benny does.

Q. Benny Steinberg? A. Yes.

Q. Do you attend weekly supervisory meetings? A. Yes, I do.

Mr. Pyle: I have no further questions.

Cross Examination

XQ. (By Mr. Somers) Mr. Massey, you don't work on the first floor, you work on the second floor, don't you? A. The first floor I am referring to as what we do our work on the line when the work is finished, like I am the first and George the second. Well, the first floor is where all the raw materials come from. So when they get up

there, they have to be sprayed. So I say the first floor and George the second floor.

XQ. But you climb stairs from the ground to get to your ... A. Yes, I do.

XQ. Now, you stated you have three or four employees in your department? A. Not as a group. But that's temporarily. When they rotate it will be three or four.

[145] XQ. You mean they rotate in and out of your department? A. Yes. Maybe switch some day my department, and sometime between the day, they might take one girl from me and put them on to George's floor.

XQ. Would George come to you and say I need one of your employees, can you spare one and you will say okay? A. No, he doesn't come to me and say that. Benny Steinberg always says that.

Hearing Officer: George is who for the record?

The Witness: George Morris.

Hearing Officer: And what's his job?

The Witness: Floor boy.

Hearing Officer: In what department is he in? Is he in the same department?

The Witness: That's another floor. That's the wood line.

* * *

XQ. And isn't it true that Mr. Steinberg has been covering your area for, oh, a very short time? A. Yes, he has.

[146] XQ. Maybe a matter of weeks or a month? A. Yes, he has.

XQ. Mr. Kabilian used to be in charge of your area. He was foreman, isn't that right? A. That's right.

XQ. And Mr. Kabilian in fact gave you much more leeway, isn't that true? A. That was before I was assistant.

XQ. How long have you been an assistant foreman? A. Six (6) months.

XQ. And how long has Mr. Steinberg been there? A. I can't remember how long he's been on that floor.

XQ. Isn't it about a month? A. It could be true.

XQ. Now, isn't it true that your responsibility, among other things, is to keep your people fully supplied so that they are constantly working? A. Right.

XQ. And isn't it true that you check the quality of their work when they finish with it? A. That's right.

XQ. And isn't it true that you have to make a judgment as to whether this work is of the proper quality so that it can be sent to customers? A. Right.

[147] XQ. And if it isn't of the proper quality, isn't it true that you will speak to an employee and show him what's wrong and tell them that this shouldn't be done? A. Yes, I do.

XQ. And if they repeatedly do this, you will go to them and you will tell them to stop doing it? A. Sometimes I go to them, plus I have to go back to Benny Steinberg to tell him.

XQ. Yes, but you yourself will go to the employee on many occasions — most occasions — in fact and tell them to stop doing this, this is wrong? A. Not most occasions. I just go back and tell Benny, and he will have to do something.

XQ. Now, what did you do before Mr. Steinberg came to work? A. Before he came on that floor?

XQ. Yes. A. I was a floor boy.

XQ. Well, didn't you do the same thing, no matter what your title was, whether you were floor boy or assistant foreman, you still did the same thing? A. Same thing.

XQ. Right. But you were told that you were assistant foreman approximately six months ago, isn't that right? A. Yes.

[148] XQ. So that Mr. Steinberg has been there approximately 1 month, so there were about five months you were a A. Yes.

• • •

XQ. (By Mr. Somers) During the period of five months prior to

[149] Mr. Steinberg taking over your area and after you had been informed that you were now assistant foreman, isn't it true that you used to go to some of the women in your department if they made repeated mistakes, and you would tell them you're making repeated mistakes and correct this? A. Yes, Charlie Kabilian was there.

Hearing Officer: You said Bill, I mean, you're referring to. . .

The Witness: I said Charlie Kabilian.

Hearing Officer: And Mr. Kabilian, he's one of the foremen?

The Witness: Yes, sir.

XQ. (By Mr. Somers) Now, let me ask you what area does Mr. Steinberg cover? A. What area?

XQ. Yes, what departments now as a foreman? A. The metal line and the wood line and the stock room and the spray room.

XQ. And this covers a very large area, isn't that true? A. Yes, it is.

XQ. And this is an entire floor of one of the buildings, isn't that true, that he covers? A. No, that's two different floors that he covers.

XQ. It's two different floors that he covers? A. Yes. [150] XQ. And there are approximately 15 employees working in this whole area that Mr. Steinberg covers, isn't that true? A. Yes.

Mr. Pyle: You mean including the. . .

The Witness: Including me.

Mr. Somers: Will the witness be allowed to testify — not the counsel for the Union?

Mr. Pyle: Well, counsel for the Union will clarify where clarification is required, and he will continue to do so.

Mr. Somers: Well, let him clarify either on redirect or by objection.

Hearing Officer: Please, if you have an objection. . .

Mr. Pyle: I think, Mr. Hearing Officer, that the witness should be told whether he's being included in the question or whether he's being excluded in the question.

Mr. Somers: If the witness doesn't understand the question, I think he can state so.

* * *

[151] XQ. And this is spread out over a very large area? In other words, that plant area. . . A. Not that very large. The floor is not that large.

XQ. Well, there are a number of departments? Isn't that true? A. Well, that's just the wood line. And the stock room, that's on the same floor. And on the metal line and the spray booth, that's on the same floor.

XQ. And all three of these areas are divided by walls, isn't that correct? A. Yes.

* * *

[152] XQ. Well, let's take an eight-hour day on an average. How many minutes during an eight-hour day is Mr. Steinberg in your area — in your immediate area? A. Oh, he comes in back and forth.

XQ. Well, let's take the total amount of minutes, can you estimate the total amount of minutes that Mr. Steinberg is in your area during an eight-hour day? A. Oh, it's about four hours, I guess. I am not too exact about it. But he's in back and forth, plus his office is on the same floor.

* * *

[153] XQ. (By Mr. Somers) Since you were first named as an assistant foreman, isn't it true that you have been attending weekly supervisory meetings? A. We don't have a meeting that often. Not weekly. Maybe two weeks or something like that.

XQ. In other words, sometimes they miss a week?
A. Yes.

* * *

[154] XQ. Now, let me see if I can refresh your recollection. Do you recall a discussion concerning Ivory Scott in his threatening to fire an employee? A. Yes, I remember that.

XQ. And do you recall at that time, Mr. Scott was told as well as the rest of you assistant foremen that you in fact have the authority to fire employees? Isn't that true? A. I remember what happened to Scotty. But I can't recollect what was told to us.

XQ. What happened to Scotty that you recall? A. Well, all I know is Scotty and a guy named Washington were having some trouble in a tank room or something like that. But that's all I can remember.

XQ. Don't you recall that Scotty told the man that if he got his coat and left, he was fired? A. Yes, he did say that.

* * *

[155] XQ. (By Mr. Somers) Do you recall Chet Williams or Harvey Berman or both commending Ivory Scott for taking that situation involving Mr. Washington under his control in doing what he did? A. They could have. I don't know.

XQ. Well, do you recall as a result of this meeting that you were informed that you have the authority to fire your employees if they did get out of hand? Or if they weren't performing up to par? A. Not that I know of. He could have said it, but I don't remember saying anything like that.

[156] XQ. But he could have said it? A. He could have.

XQ. Do you recall any discussion about a smoking problem? A. Yes.

XQ. All right, could you tell us what you remember about

a smoking problem or a discussion concerning that? A. They say if any girl is not supposed to be smoking on the lines, and if a girl gets caught smoking and I tell her to put the cigarette out, if she don't put the cigarette out to come back and let whoever is over me do something about it.

XQ. Isn't it true that when the discussion of the smoking problem came up, you told Management that you would handle your employees, and you would discuss it with them? A. Yes, I did.

XQ. And, in fact, you did go back to your group and you called them together and you told them you didn't want any smoking on the line? A. Not as a group, no. I just told one person.

XQ. You told one person? A. One person because she was caught smoking. She was caught smoking, but I didn't see her. Chet Williams said he seen her. I said if you seen her smoking, why didn't you tell her to put the cigarette out. He said I was standing around, and he wanted me to observe that. So the next day came. I told the [157] girl Chet Williams said he doesn't want any smoking on the line. You can get fired if you get caught smoking.

XQ. That's what you told her? A. Yes.

XQ. And isn't it a fact that Chet Williams told you to be the one to talk to her because he wanted you to be in control of your people? A. Yes, he did.

XQ. Now, do you recall speaking with Chet Williams and with Harvey Berman and asking both of them to keep off the floor because you wanted the direct line of authority as to your people? You didn't want them interferring? A. Oh, that was about a particular job, yes.

Hearing Officer: What was it? Explain for the record.

The Witness: Well, what I took for granted they said I was going to be the assistant foreman, and we were do-

ing a certain item, and I know this is the way it's supposed to be done. I am going to do it this way. And they come around trying to be friendly. And the girl would say, look at this piece here. He's not doing it right because he said he's not doing it right. And Chet says, maybe he's says, no, just do it like this. Do it my way. And so that makes me feel like I am not assistant or whatever they call it.

[158] XQ. In other words, they were under your authority? That's the way you felt? A. Yes.

XQ. And you wanted to be in control of the way those three employees were run? A. That's right.

XQ. So, in other words, since you wanted to take control over that department, you wanted to manage that department yourself because this was your understanding of the authority you had? Isn't that right? A. No, not to my knowledge. I didn't want to manage the whole department.

XQ. No, I mean the three employees — A. Yes, just the employees — the floor.

XQ. Now, haven't you on occasion said to Chet Williams that the girls in your department want more money? Do you recall saying that to Chet Williams or to Harvey Berman? A. No, I don't recall saying that. What I told them was that I wanted more money.

XQ. Did you get it? Did you get more money? A. Yes, I got it. He gave it to me.

XQ. Now, were you asked to fill out a quality check list? A. Yes.

XQ. And when you fill this out, what do you have to do prior [159] to checking in the boxes? A. Oh, I check for oversized holes or clogged holes or oversized felt or thin felt and incorrect screw. I check for that and the correct...

XQ. Is this the insert screw? Is that what you mean?
A. Yes, insert screw, pin wheel screw, too.

XQ. And you check to see if there is proper assembly on a certain part? A. That's right.

XQ. And you check the contents to see that they are all packaged completely? A. That's right.

XQ. And you check the finish? A. That's right.

XQ. And you have to make a judgment as to whether these things are done properly, isn't that right? A. That's right.

XQ. And after you have made that judgment, if the felt is oversized or if the insert screw length is not proper, then you will go to the employee and tell him so, isn't that right? A. No, I would change it. If the felt is oversized, the girl knows that it has to be trimmed, so she'll trim it off.

XQ. So you will go back to her and say this is oversized, I want [160] you to trim it off? A. No, she'll know that it's oversized.

XQ. Well, it gets by her on occasion, I'm sure, and you inspect it? Isn't that right? A. Yes.

XQ. And then at that stage, if it's oversized, you will take it back to her? A. No.

XQ. What do you do? A. The girl packing, she'll trim it. I may have another girl who just trims.

XQ. Oh, so you'll have her do it? A. Yes.

XQ. Isn't it true that you receive approximately 50 cents more than any girls who work under you? A. 50 cents more?

XQ. An hour? A. I don't know how much the girls make.

XQ. Well, you know you receive. . . A. I make \$2.35. I don't know what the girls make.

XQ. You know you make considerably more than they do, don't you? A. Yes, I know I do.

XQ. Can you independently requisition supplies? Can you get supplies for your area? A. Yes.

[161] XQ. Isn't it true that the girls know that they are supposed to take orders from you as to their operation minute-by-minute operation? A. I say sometime they may act like they know, but they don't do it.

XQ. In other words, there are occasions when they are just not doing what you instruct them to do? A. Yes, most of the time. Not occasionally — most of the time.

XQ. Why is that? A. I don't know. I think it's they think I am not there long enough to be an assistant foreman or a foreman or something.

XQ. Well, if you had been there for ten years, maybe they'd look at you differently? A. Yes, maybe so.

XQ. Who else attends these weekly meetings? A. Oh, . . .

Mr. Pyle: He said they were every other week, Mr. Somers.

XQ. (By Mr. Somers) Or every other week, whenever they are held? A. Myself and George Morris and Ivory Scott, Harvey Berman, and Chet Williams, Charlie Kabilian, Benny Steinberg. I think that's about all.

XQ. Mr. Zagrafos attend these meetings also? A. Yes, Ray, he does.

[162] XQ. And during these meetings, you discuss the operations of the plant, isn't that true? A. That's true.

XQ. And you discuss the performance of each area, Mr. Morris's area, Mr. Zagrafos's area, Ivory Scott's area? A. That's true.

XQ. And you discuss the flow of production as to whether everything is coming out properly, the problems that you're having in your department? A. Yes.

XQ. And you discuss the problems with the product as well as the problems with the employee? A. Yes, we do.

XQ. And you may be asked by Mr. Williams or you're asked by Mr. Williams, are your employees following

through on this, or are they keeping at it, are they obeying the rules — things like that? A. They never say obeying the rules.

XQ. Well, he asks whether they are continuing with their production, and they are paying attention to their job?

A. Yes, he may ask that sometimes.

XQ. And you will give your opinion as to how your people are doing? A. I give my opinion, yes.

* * *

[164] XQ. (By Mr. Somers) Do you recall about two weeks ago that there was a meeting of the plant managers and general foremen, and you were told to take over during this meeting and the meeting lasted about two hours?

A. They had a meeting, but I wasn't told anything. But I observed that myself. I knew they were having a meeting.

XQ. So you took over the area? A. I just kept the women supplied. They know their job. They know what they're supposed to do.

XQ. And made sure everybody was working? A. Yes, I made sure everybody had everything they needed.

XQ. Now, do you recall a discussion at a meeting in which the smoking of Mr. Noiles was discussed? A. Yes.

XQ. And at that time there was a question about disciplining Mr. Noiles concerning his smoking? A. Yes.

XQ. And do you recall that Ivory Scott said that he wanted to handle it on his own in his own way? A. I don't remember how he put it, but I remember Chet saying like that's your best friend.

[165] XQ. Yes? A. And Scotty said, well, you see, you can't go to him this way. You've got to go to him like this, and talk to him that way.

XQ. And who did talk to him, didn't Scott talk to him? A. I wasn't around. I guess he did. I don't know.

* * *

[167] Hearing Officer: Do you punch a time clock Mr....

The Witness: Yes, I do.

Hearing Officer: Do the girls working in the department with you and the other employees working in the department with you punch a time clock?

The Witness: Yes, they do.

XQ. (By Mr. Somers) Does Mr. Steinberg punch a time clock? A. I am not too sure, but I think he does. I'm not too sure.

XQ. What about Mr. Kabilian? A. Yes, he punches one.

Hearing Officer: Do you get paid for overtime?

The Witness: Yes.

XQ. (By Mr. Somers) Does Mr. Steinberg get paid for overtime? A. I don't know whether he's on a straight salary or...

XQ. Excuse me? A. I don't know if he's on a salary or regular time.

XQ. Does Mr. Kabilian get paid for overtime? A. I think so. I'm not sure. I don't know how they get paid.

[168] Hearing Officer: Mr. Somers, previous testimony Mr. Ford was on the witness stand, I think, Mr. Berman also, my recollection is that all the assistant foremen and the rank and file employees enjoyed the same benefits, that is, as far as no pension plan, the pension plan does not apply to the—

Mr. Somers: Does not apply to them, and also...

Hearing Officer: To the assistant foremen, nor does it apply to the rank and file employees in the plant and the production and maintenance employees in the plant.

Mr. Somers: Correct, and does not apply to some of the foremen also.

Hearing Officer: And the same applies also as far as the insurance plan that it does not apply to the assistant foremen, nor does it apply to the production and maintenance employees.

Mr. Somers: It doesn't apply to some of the foremen also.

* * *

[170]

GEORGE MORRIS

was called as a witness by and on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Hearing Officer: Would you give the Reporter your name, sir?

The Witness: George Morris.

Hearing Officer: Are you employed at the Magnesium Casting Co.?

The Witness: Yes.

Hearing Officer: And your address is what, sir?

The Witness: 58 Franklin Avenue, Dorchester.

Direct Examination

Q. (By Mr. Pyle) How long have you worked for the Company? A. About maybe 18 months.

Q. And what is your job at the Company? A. Floor boy.

Hearing Officer: What was it?

The Witness: Floor boy.

Mr. Pyle: Floor boy.

Q. (By Mr. Pyle) In what part of the plant? A. Gift line.

[171] Q. And what do you do as a floor boy? A. Well, get the material for the rest of the employees.

Q. How many other employees are there that you supply with materials? A. Maybe three.

Q. Is it sometimes more? A. Sometimes more, yes.

Q. Sometimes less? A. Yes.

Q. What else do you do besides supplying them with the material they need to work? A. Well, I check their work and, you know, go around and see if...how the felt fits and...

Q. That is, you inspect their work? A. Inspect their work, yes.

Q. What else do you do? A. Aside from the line where I am at?

Q. Well, in addition to supplying the girls with work and checking their work, what else do you do? Do you work by yourself? A. Yes.

Q. What's that work? A. Well, maybe I may buff.

Q. And what products are you working on? A. Wood.
[172] Q. Wood? A. Yes.

Q. What are they? A. Pen sets.

Q. Pen sets? A. Pen sets. Pencil caddies, and calendars and desk pads.

Q. And do the other employees in the area where you work assemble and package these items? A. Yes.

Q. Is Mr. Steinberg the foreman in your area? A. Yes.

Q. And does he ever come around and watch the girls working? A. Yes.

Q. Does he watch you work? A. Yes.

Q. How often does he come around and observe the work?
A. Maybe five or ten minutes.

Q. Every five or ten minutes? A. Maybe so.

Mr. Somers: Objection, leading the witness.

Hearing Officer: He asked him how often he came along.

[173] Mr. Somers: And his answer was five or ten minutes, and his remark was every five or ten minutes.

Mr. Pyle: That's obviously what it means.

Mr. Somers: I'm not sure it was obvious.

Q. (By Mr. Pyle) When Mr. Steinberg is watching the other employees working, if they do something wrong, does he correct them? A. Yes.

Q. Have you ever hired any employees? A. No.

Q. Ever fired anybody? A. No.

Q. Ever suspended anybody? A. No.

Q. Ever recommended anybody for a wage increase?
A. No.

Q. Now, how long have you been called an assistant fore-

man by the Company? A. About November I guess—about November.

Q. About November of last year? A. Yes, of last year, yes.

Q. And who was the assistant foreman before you were made assistant foreman? A. No one.

Q. Didn't have any? A. No.

[174] Q. Did you get a pay increase when you became assistant foreman? A. Yes.

Q. How much? A. I got a dime.

Q. A dime? A. Yes.

Q. And what do you make now, \$2.35? A. Yes.

Q. Do you know what the other employees make in your area? A. No.

Q. You don't know what their wage is? A. No.

Hearing Officer: Are they girls that work in the area where you're working?

The Witness: Well, I have the sprayer, you know.

Mr. Pyle: Excuse me just a minute, Mr. Paone.

Q. (By Mr. Pyle) Who assigns work to the employees in the area where you work? A. Benny Steinberg.

Q. And how is that done? A. By putting a note up on the cabinet.

Q. Is that like the note Mr. Massey told us about? A. Yes. Yes.

[175] Q. And that's posted how often? A. Every day.

Q. What time of day? A. Practically about 4:00, 4:30—something like that.

Q. What's quitting time? A. 4:30.

Q. Now, if one of the employees in your area wants to leave the plant, who does she talk to? A. She would talk to me, but I have to go to Benny and tell him that she wanted to leave. And then I would have to come back and tell...

Q. You'd tell her what Benny said? A. Yes.

Q. Do you make out a daily production sheet? A. Yes.

Q. Every day? A. When I don't forget, you know, I make one out then.

Q. You make one out, except when you forget to make it out? A. Yes.

Q. And what happens if you don't make it out? A. Well, maybe the next day, he'll come and tell me that I didn't make the report out.

Q. Steinberg? A. Yes.

[176] Q. Do you attend these supervisory meetings that—I don't know whether we should call them supervisory meetings—but do you attend these meetings every other week that Mr. Massey talked about? A. Yes.

Mr. Somers: I thought you were correct the first time, supervisory meetings.

Mr. Pyle: I don't know. You don't have too many supervisors there.

All right, no further questions.

Cross Examination

XQ. (By Mr. Somers) Mr. Morris, you said that you stated that you attended supervisory meetings. How often are these held? A. Practically every two weeks.

XQ. I see. Now, isn't it true that during these meetings, you discuss the production in your area? A. Yes.

XQ. And you discuss the performance of the employees in your area — how they are doing? A. That would be asked, yes.

XQ. And you discuss the products in your area and how they are coming out, whether they are properly being finished? A. Yes.

[177] XQ. And isn't it true that in one of these meetings, going back to pretty far to late August, you were told at that time that you have the authority over your people, and

you can fire them if they get out of line? A. They said I could fire, but I couldn't unless I had to come to Benny Steinberg or Charlie Kabilian then. But I couldn't fire them.

Hearing Officer: He could not fire them. He said he had to go to Benny Steinberg.

The Witness: Or Charlie Kabilian.

XQ. (By Mr. Somers) In other words, you're saying you could recommend that a man be fired. You could come to Kabilian or Steinberg, and you could say I think that whoever it is should be fired because she's not doing her work? A. I would have to go to Benny Steinberg.

XQ. Right, but you would come to Steinberg, and would make the recommendation? A. That he be fired?

XQ. Yes, isn't that what they were telling you you could do? A. Yes.

XQ. And do you recall a discussion concerning an altercation or a problem that arose between Ivory Scott and William Washington? A. I recall, yes.

[178] XQ. And do you recall that Mr. Scott was commended for taking things into his own hands and telling this Mr. Washington, that if he left, if he put on his coat and left, he was fired? A. I remember that, yes.

XQ. In fact, this was the time when you discussed firing employees, whether you people could fire employees? Do you recall that being the same meeting? A. I don't remember that I discussed, you know, fire an employee on my own. I don't remember that, no.

XQ. But you remember this discussion, though, taking place at a meeting where the assistant foreman and the foreman... A. I remember what Scott brought up, but I don't remember nothing else.

XQ. But Scott at that time was an assistant foreman, the same as you? A. Yes, that's what he says he was.

XQ. Now, you have three women that work under you, is that right? A. Maybe I don't have three sometimes.

XQ. Sometimes you have more? Sometimes you have less? A. Yes.

XQ. And do you move these women from one job to another, depending upon what your supplies are at that moment?

[179] A. Repeat that again please?

XQ. Do you have to move the women from one job to another, depending upon what your supplies are that you have? A. If they've got something to run, I will have one woman felt and one maybe packing.

XQ. Yes? A. So they just stay in the same position.

Hearing Officer: They stay there all day?

The Witness: As you've got a job, she's got a job felting, unless they run out of work.

Hearing Officer: When they are out of work, what happens?

The Witness: Maybe they'd be shifted around.

XQ. (By Mr. Somers) Now, aren't there occasions when there is a lot of packing to be done, and you will need an extra person on the packing? A. Yes.

XQ. And on those occasions, do you take one woman from an area like felting and put her over on packing? A. Most time I pack.

XQ. I see, but there are occasions when you take another woman to help pack? A. Sometimes, yes.

Hearing Officer: Do you pack every day?

[180] The Witness: Most of the time, yes.

Hearing Officer: You do buffing during the day?

The Witness: Yes, cutting wood, too.

XQ. (By Mr. Somers) Isn't it true that Mr. Kabilian on occasion in the past has helped pack also? A. Packed? You mean wood line?

XQ. Yes. A. Not that I can recall.

XQ. Do you recall Mr. Berman ever helping you with the buffing?

Hearing Officer: Which Berman are you referring to?

Mr. Somers: Harvey Berman.

The Witness: Maybe come by, you know, hit a few strokes.

(Laughter.)

XQ. (By Mr. Somers) How does he do?

Hearing Officer: What would he do?

The Witness: Come out and hit a few strokes.

* * *

[181] XQ. Do you recall Mr. Massey telling Mr. Berman and Chet Williams that he would have better control of his people if they didn't come over into his area because they disturb his own authority? A. Yes.

XQ. And do you recall that you agreed with Mr. Massey on this? A. Yes, I remember. But I recall that they said I was an assistant foreman.

XQ. Yes. A. But when they come around, I don't have no respect, you know?

XQ. So, in other words, you didn't want them coming around because that disturbs your control over your people?

A. Yes, I still don't have any control.

* * *

XQ. (By Mr. Somers) Do you recall last week stating that you needed more work on your line because your people weren't busy enough? A. Yes, I remember. Yes.

XQ. And that was at a meeting of the supervisors, isn't that right? A. Yes.

[182] XQ. Now, you fill out a quality check list, don't you? A. Yes.

XQ. And in filling out that list, you have to examine the parts that come out of your department to see that they are properly assembled, they are properly taken care of — properly buffed, isn't that right? A. Yes, right.

XQ. Now, if you should come across, if you should come across as an example a pen set and it hasn't been properly assembled or hasn't properly been buffed, would you go back to the individual and tell them that you want this done correct? A. Well, what I would do I would put it aside, you know. Then maybe if Benny come through, I will let him look at it. And then he'll say, maybe he might say something and send it down, send it on if it's good, you know.

Hearing Officer: But you'd wait for Benny?

The Witness: (no response.)

XQ. (By Mr. Somers) You don't wait for Benny to come in all the time, do you? A. No.

XQ. Have you seen girls making mistakes while they are working? A. Yes.

[183] XQ. What do you do? A. I would stop it.

XQ. You go over to her and what do you say to her? A. I'd say that's the wrong way to do...

XQ. And you'd tell her do it correctly? A. Yes.

XQ. Do they ever talk back to you? A. No, I have no trouble.

XQ. In other words, they know that you're in charge, — and they don't talk back to you?

Mr. Pyle: Oh, I object.

Hearing Officer: Let the witness give the testimony if you will, gentlemen.

XQ. (By Mr. Somers) Isn't that true?

Mr. Pyle: I object. Move that...

Hearing Officer: Do you understand the question, sir?

The Witness: No.

XQ. (By Mr. Somers) The women don't talk to you because they know you're in charge?

Mr. Pyle: I object.

Hearing Officer: Now, you rephrase the question. The

objection is sustained. Do you want to rephrase the question. Go ahead.

You mentioned Benny, were you talking about Kabilian or Steinberg?

The Witness: Benny Steinberg.

[184] Hearing Officer: He's the one that would say leave the desk set there or tell you to bring it back to a girl and have something further done to it or something?

The Witness: Yes.

Hearing Officer: All right.

XQ. (By Mr. Somers) But there are times you do it without Mr. Steinberg coming by? A. Yes, I have done it, yes.

XQ. Do you recall the discussion concerning the smoking problem? A. Yes, I remember.

XQ. And that was at a meeting of the supervisors when that discussion came up, isn't that right? A. Yes.

XQ. And after that meeting, do you recall you went back to your people and told them that you didn't want smoking and a lot of talking going on while they're working? A. Yes.

XQ. Did you speak to them individually, or did you call them together? A. Individually.

XQ. And they knew you were talking with Management's authority when you spoke to them?

Mr. Pyle: I object. He can't testify what somebody else knew.

[185] Mr. Somers: I'll withdraw that.

XQ. (By Mr. Somers) Now; if you run out of stock during the day so that the assignments cannot be carried out because there's nothing to do, what do you under those circumstances? A. If I run out of stock?

XQ. Yes. Do you order more stock? A. Yes.

XQ. All right, now, assuming that there is no more things to be done because the order has been filled, do you have

the employees do something else? A. Give me another job?

XQ. No, do the employees do something, do you have these three employees do something else? A. Benny would have them do something else.

Hearing Officer: What would you do? Go to Mr. Steinberg?

The Witness: Yes.

Hearing Officer: For the record, Benny is Mr. Steinberg, the foreman of the department. You would go to Mr. Steinberg and tell him you're out of work?

The Witness: Out of work, yes.

Hearing Officer: What do we do from here on?

The Witness: Yes.

Hearing Officer: And then he'd tell you all right, we'll start another order?

[186] The Witness: Yes.

XQ. (By Mr. Somers) Then you would come back and tell the girls what's to be done? A. Yes.

XQ. And you would assign the girls to do the jobs? A. No, he would assign them.

XQ. You would inform the girls? A. He would give me the names of the girls, you know.

XQ. And you would go to the girl and tell her what she has to do? A. Yes.

XQ. Do you remember a discussion at one of the supervisors' meetings where there was a question of disciplining Mr. Noiles? A. I can't remember that.

XQ. You don't remember? Do you recall any discussion of Mr. Noiles smoking near the chemicals? A. I don't remember that.

XQ. How often do you buff during the day? A. Maybe I buff a whole day. Maybe I cut wood a whole day. Sand wood a whole day.

XQ. When was the last time you did buffing? A. Friday.

XQ. Friday? A. Yes.

[187] XQ. How long did you buff Friday? A. I cut wood all day. I buffed a half a day, and I cut wood.

XQ. At the same time, were you watching these girls? A. No.

XQ. Did you do any inspection that day? A. Not on the girls, no.

XQ. Was your line operating that day? A. No.

XQ. So this was an unusual situation because your line was down? Your line wasn't operating? A. It was down. No, it was operating, yes.

Hearing Officer: Yes, it was operating.

XQ. Was it operating all day? A. Not all day, no.

Mr. Somers: I have nothing further.

Hearing Officer: Was it operating while you were cutting wood?

The Witness: Yes.

Hearing Officer: How much were you hired at?

The Witness: \$1.75.

XQ. (By Mr. Somers) Who was supplying the girls with work while you were cutting wood? A. I supplied them. Then I went back to cutting wood.

Hearing Officer: You were doing both?

[188] XQ. Who was checking their work? A. No one.

XQ. You mean there was nobody checking that day? A. No.

XQ. Is this proper procedure for your department? A. No.

XQ. Is this the normal procedure for your department? A. No.

Mr. Somers: I have nothing further.

Mr. Pyle: No questions.

Hearing Officer: When you are out, say you want to take a day off, tell me what happens?

How do you go about taking...

The Witness: I have to go to Benny Steinberg or either Chet Williams and tell him.

Hearing Officer: And supposing... That is, when you want to take a day off, you ask them for their permission?

The Witness: Yes.

Hearing Officer: Tell me when one of the girls don't show up, one of your line girls, do they call you, or do they call Mr. Steinberg and tell him they are not coming in the morning?

The Witness: Steinberg.

Hearing Officer: They call Mr. Steinberg.

[189] If one of the girls comes in late, Mr. Morris, do they report to you that they were late, or do they go to Mr. Steinberg or how is that accounted for?

The Witness: Steinberg.

Hearing Officer: They go to Mr. Steinberg. Do you ever recommend any of the girls in the line for an increase in pay?

The Witness: No.

Hearing Officer: Do you check the time cards of the employees in your line there?

The Witness: Do I check it?

Hearing Officer: Yes.

The Witness: You mean do I punch in?

Hearing Officer: No, I say do you check their time cards?

The Witness: No.

Hearing Officer: You don't. Do you know whether Mr. Steinberg checks their time cards?

The Witness: Yes, he checks it.

Hearing Office: Can it be stipulated that the same benefits that applied to the other assistant foremen are applicable to Mr. Morris?

Mr. Somers: Yes.

Mr. Pyle: Pardon?

Hearing Officer: I asked on the record can it be stipulated the same benefits that are applicable to the other assistant foremen are applicable to Mr. Morris?

[190] Mr. Pyle: I will stipulate the same benefits and the same lack of benefits.

Mr. Somers: I won't stipulate to the latter remark. They do receive the same benefits. He receives the same benefits as the other assistant foremen.

* * *

[191] Hearing Officer: If one of the girls in the line came in, I don't say it happens, but if one of them came in drunk, what would you do?

The Witness: I would have to go to Benny.

Hearing Officer: Mr. Steinberg?

The Witness: Yes.

Hearing Officer: And report it to him?

The Witness: Yes.

Hearing Officer: And let him make the decision?

The Witness: Yes.

* * *

[198] Hearing Room 2007-A
JFK Federal Building
Boston, Massachusetts
Thursday, April 18, 1968

* * *

[200] IVORY SCOTT
was called as a witness by the Hearing Officer and, having been first duly sworn, was examined and testified as follows:

Examination

Q. (By the Hearing Officer) Please be seated. Will you give the Reporter your name, is? A. Ivory Scott.

Q. And your address? A. 3 Nising Court, Dorchester.

Q. Are you employed at Magnesium Casting? A. Yes, sir.

Q. What department are you employed in? A. Electro plating.

Q. What other employees are in the electro plating department besides yourself? A. I have three other men.

Q. Three other men? And the
Washington, Donald Noiles, and
[2011] Q. Tell me, these are the
Nocero.

[201] Q. Tell me, these are the three that work with you in the electro plating department? A. Right.

Q. And tell me, what do the employees in this department do? Tell the record. A. Donald Noiles is a scratch brusher, Nocero is a scratch brusher, and William Wash-

Mr. Wanger: I'm sorry, Mr. ^{too.} Hearing Officer, I couldn't hear.

Q. (By the Hearing Officer) Scott? A. Donald Noiles is a ⁵Speak a little louder, Mr.

Mr. Wanger: Scratch brush^{brusher}.

The Witness: Right, Willir?

and a scratcher brusher, he's a ^{man} Washington is a plater

Mr. Wanger: Thank you. Scratch brusher.

Q. (By the Hearing Officer electro plating department is And the foreman of the

Q. Charlie Kabilian? A. Rho? A. Charlie Kabilian.

Q. Tell us how you spend thht.

When do your work, day shiftwork day from the time...

[202] Q. And what time is the A. Day shift, right.

Q. And that ends at what timday shift? A. 7:00 o'clock.

Q. 5:00? A. Yes. ? A. 5:00.

Q. All right. Now, will you do from the moment you comll the record just what you until you leave at 5:00? A. In at 7:00 in the morning temperatures first. Then I set 00 in the morning I check we start running it through tb my tank for plating. Then utes. Then we start taking it cycle. Then I wait 20 min-tank all day dry. out of the tank. Then I run

Q. Will you explain what do
all day... A. After taking the
being scratch brushed, put in
taken out, put in a wetting
nt. Then we take it out of

the wetting agent into a dryer. Then we send it out. At the end of the day, I filter the tanks, set up my room for the next morning.

Q. All right. Now, tell me what Mr. Washington does?

A. The procedure I do, but only his is in the gold room. It's a gold [203] deluxe. He runs tanks in the morning first off, and he waits 20 minutes until it's plated. Then he takes it out, scratch brushed — same procedure — dry it and send it out. At the end of the day, he cleans his room up, filter tanks and get it set up for the next morning.

Q. Now, will you tell us what Mr. Noiles does? A. Mr. Noiles, he scratch brushes all day until the end of the day; and at the end of the day, he assists me in pumping tanks and making samples of the solution.

Q. And Mr. Nocero? A. Mr. Nocero, he cleans the product out of the tanks. At the end the day, he cleans the product out of the tanks that falls off the racks.

Q. And what does he do during... Does he do the same thing during the day? A. No, he's a scratch brusher during the day.

Q. Are you paid by the hour? A. Right.

Q. And your hourly rate is what? A. \$2.35.

Q. And Mr. Washington paid by the hour? A. Yes.

Q. Do you know what Mr. Washington's rate is? A. No, I don't.

[204] Q. Do you know what Mr. Noiles's rate... Is he paid by the hour? A. Yes.

Q. Do you know what his rate is? A. No, I don't.

Q. And Mr. Nocero, is he paid by the hour? A. Right.

Q. When did you first start to work for Magnesium Casting, Mr. Scott? A. July of '65.

Q. July of 1965? A. Right.

Q. Tell me, what work have you done since you were first hired in July of 1965? A. I started off just running the tanks when I first started.

Q. In the electro plating department? A. Right. Then I became a scratch brusher about three months later. And then after a year passed, they sent me to MIT for electro plating.

Q. How long did you attend school for electro plating, Mr. Scott? A. Oh, about... I can't recall. I'll say about four months — something like that.

Q. And that was... When did you attend school, after work was it, or... A. Yes, after work.

[205] Q. And how often did you attend, one night? A. Every Tuesday night.

Q. Every Tuesday night? A. Yes.

Q. Tell me, what rate of pay did you start off with in July of 1965?

Mr. Somers: Objection. What's the relevance of what his starting pay was?

Hearing Officer: Objection is overruled.

Q. What rate of pay did you start with? A. About 50.

Q. A dollar fifty? A. Right.

Q. And will you tell us how you went on up to your present rate? When was the next increase in pay you received? A. A month later.

Q. A month later? A. Right.

Q. And what was that, how much, sir? A. \$1.55.

Q. And when was your next increase? A. About two months later.

Q. And that was what? A. Up to \$1.65.

Q. When was your last increase?

[206] Mr. Somers: Objection. What's the relevance of his last increase?

Hearing Officer: The objection is overruled. I need not tell you that we're in a non-adversary proceeding, and I know you want the Regional Director to have all the information in which to make a proper determination.

Mr. Somers: I think he should have all the relevant information. I don't see that this is relevant.

Hearing Officer: Well, I feel that this is relevant information.

All right, proceed, Mr. Scott.

Mr. Somers: I have an exception to the rule.

Q. (By Mr. Paone) The last increase in pay was that you received. . . A. A month ago.

Q. And that was how much? A. Ten cents.

Q. Tell us, Mr. Scott, now you told us you started at 7:00 in the morning. Now, how do you know what work to tackle, I mean, as you start in, is there a schedule on the wall?

A. Yes. Charlie [207] comes by just before time to go home, and he puts the number that I am supposed to run.

Q. And that is whom, sir? A. Charlie Kabilian.

Q. And he is the foreman? A. Right.

Q. And he puts on the wall in the room where you work. . . A. Right.

Q. . . what work you're to run through that day? A. Right.

Q. Tell me, about how long has Washington been working with you Mr. Scott? A. Oh, Washington was there before I worked.

Q. He was. And Mr. Noiles? A. I'd say about almost a year.

Q. And Mr. Nocero, how long was he been with you in the electro plating department? A. A year and a half.

Q. Do you punch a time clock? A. Who, me?

Q. Yes. A. Yes.

Q. Do these employees, Washington, Noiles and Nocero punch a time clock? A. Yes.

Q. Tell me, Mr. Scott, one of the employees, say Washington [208] Noiles and Nocero, is not going to show up for work, what procedure does he go through? Does he call in the morning and telephone, who does he talk to tell them

he's not going to be in that day? A. Charlie Kabilian or Chet Williams.

Q. And when one of these employees wants time off that are with you during the day, who would they go to, how would they go about getting the time off? A. Well, he would tell me, he says, "I'm going to leave." Then he'd go and tell Charlie that he's going to leave. He would tell me first that he's going to leave, and then he'd go and tell Charlie Kabilian that he's going to leave.

Q. And Charlie Kabilian told him that the work was too heavy, he couldn't leave, he'd have to stay on the job. Has he ever told him that? A. If the work is too hard?

Q. Yes. A. That he could leave?

Q. Say he needed him on the job, I mean, would Kabilian tell him that, I mean, that he couldn't leave the time off or what?

Mr. Somers: Objection. This is conjecture — has he ever heard this discussion? We haven't established whether he's ever heard this discussion.

[209] The Witness: I have never heard it before.

Q. (By the Hearing Officer) Well, let's put it this way. When one of the employees — strike the question. When your out sick, Mr. Scott, are you paid for the time off? A. No.

Q. When the employees are out sick, either Washington, Noiles or Nocero, are they paid while they're out sick? A. No.

Q. Do you have a pension plan at the shop? A. No.

Q. Well, it has been stated here on the stand here by Mr. Berman that there is a pension plan at the shop. Now, my question to you, are you covered by the pension plan? A. No.

Q. Do you know if any of these employees, Washington, Noiles or Nocero, any of the employees are covered by the pension plan? A. No.

Q. That is, they are not covered? A. They are not.

Q. What benefits do you receive, Mr. Scott? A. Blue Cross Blue Shield.

Q. And when did you start to receive Blue Cross Blue Shield? A. About two months ago.

[210] Q. Prior to that, did you have any other insurance coverage that you know of? A. No.

Q. The answer is no? Any of the employees have any coverage as far as you know? A. No.

Q. How about a vacation plan, do they have one at the shop, Mr. Scott? A. Vacation plan?

Q. Yes. A. Not that I know of.

Q. Now, do you get any vacation? A. Yes.

Q. Please? A. Yes.

Q. What vacation do you get? A. Two weeks in July. Two weeks of July.

Q. Is it a paid vacation? A. Yes.

Q. And how about the other employees, Washington, Noiles and Nocero? A. Yes.

Q. Do they receive... A. Yes.

Q. ...the same vacation that you receive? A. Yes.

[211] Q. Do you have a title, Mr. Scott? A. Title 7

Q. Do you understand the question? Are you classified with a title in the shop? A. No.

Q. Do you understand the question? A. Yes, I do.

Q. Do you have any authority to hire employees? A. No.

Q. Do you have any authority to fire employees? A. No.

Q. Do you have any authority to suspend any employees? A. No.

Q. Do you have any authority to lay off any employees? A. No.

Q. Do you have any authority to recall or promote any employees? A. No.

Q. Do you have any authority to discipline employees? A. No.

Q. Do you have any authority to adjust any grievances of employees? A. No.

Q. Have you ever interviewed any employees for work? A. No.

[212] Q. Now, you stated that Mr. Kabilian, the foreman, puts the work that's to be run out on an assignment sheet and the assignment sheet is on the wall and you work from that assignment sheet? A. Right.

Q. Now, can you tell me when work runs out, what happens if any work runs out that's on that assignment sheet? What happens then? Do you go to Kabilian for further work, you tell us what happens? A. Right. I go to Charlie Kabilian for further work. Right.

Q. And tell — he'll tell you what other jobs to run through is that it? A. Right.

Q. Now, these tanks that you were talking about, I understood you to say you take the products out of the tank? A. Right.

Q. These products what are they, ashtrays and desk sets? Is that what it is? A. Right.

Q. And you take those out manually, is that it? A. That's right.

Q. And that's the type of work that you do day in and day out? A. Right.

[213] Q. And Washington does similar work? A. Yes.

Q. Have you ever recommended anyone of these employees for a raise in pay, Mr. Scott? A. Yes, I have.

Q. And tell us what took place? A. Well, I recommended Donald Noiles. He wanted a raise. So I went and told Charlie that Donald wanted a raise. Charlie Kabilian.

Q. And then what happened? A. He received it.

Q. He received the raise? A. Yes.

Q. Is there anybody else that you know of that you have asked Charlie Kabilian, the foreman, a raise for any of the other employees? A. No.

Q. Did you ever transfer any of the employees that work with you in the electro plating department, Mr. Scott?

A. No.

Q. Do you have the authority to transfer any of those employees that work with you? A. No.

Q. Do you know, Mr. Scott, what the policy is with respect to employees in the department, I mean, as far as wage increases? [214] Do you understand the question?

A. No, I don't follow you.

Q. All employees start at a certain rate of pay, do they? A. (No response.)

Q. Do you know? A. I don't know, no.

Q. You don't know. Do you know whether if an employee starts at one rate and then after one month he gets another rate, after three months he gets another rate, do you know?

A. No.

Q. You don't. Do you wear work clothes out in the shop the same as Mr. Washington and Noiles and Nocero, Mr. Scott? A. Yes.

Q. Do they have Management meetings at the shop, Mr. Scott — supervisors' meeting? A. Yes, they do.

Q. Do you attend the meetings? A. Yes, I do.

Q. How often do you attend the meetings? A. Every week. Every week.

Q. Will you tell the record just what takes place at these meetings that you attend weekly? A. We talk about the quality of the [215] work and quality control, how we're working.

Q. How often does Mr. Kabilian come into the shop there in the electro plating, Mr. Scott? During the day? A. Not much. Not much.

Q. Well, how often would you say? A. Well, the longest — the only time he comes in is to come in to get racks, you know, to take out so the product can be racked on.

Q. If he has some instructions, he leaves them with you

at that time? A. The only time he instructs me is when we're running specials — a special product, yes, he'd tell me.

Q. Do you — Washington does similar work that you do? A. Right.

Q. During the day. Now, does anyone inspect his work, check the work that Washington does? A. They have a lady outside. She checks his work before it's sent upstairs.

Q. I see. So all these products after they are taken out of the tanks by yourself, by Washington and the work that the other gentlemen, Noiles and Nocero do on these products, they proceed from the electro plating department. They go out to the packaging department? A. Right.

[216] Q. And the girls that are working out in the packaging department, if they note some — something strange on the one of the products, they put it aside? A. Right.

Q. And they will take it up with whom? A. Well, they will see Charlie. He'll come in and tell me.

Q. When an employee wants time off, Mr. Scott, you have to — Can you grant the time off without discussing it with Mr. Kabilian or Mr. Williams? A. No.

Q. Can you excuse any of the employees if he comes in late, Washington come in late? A. Well, I never did it.

Q. I say can you excuse them for coming in late? A. I really don't know.

Q. Has anyone, Mr. Williams or Mr. Kabilian or Mr. Berman or any of the high level supervision there, ever told you that you had authority to hire or fire any employees? A. Well, he told me to get rid of them.

Q. Who told you? A. Chet and Harvey.

Q. Tell us what happened. A. He told me if I didn't want a man to get rid of him in the room. It wasn't fire. He didn't say that. He said get rid of him.

Q. Okay.

[217] Hearing Officer: I don't have any further questions at this time.

Do you have any questions?

Mr. Wanger: A few further questions.

Cross-Examination

XQ. (By Mr. Wanger) Mr. Scott, when were you made an assistant foreman—so-called? A. I can't recall when it was.

XQ. Was it a year ago? A. Approximately, yes.

XQ. Approximately a year ago? A. Yes.

XQ. And in all that time, is it as you have told us today, you have made one so-called wage recommendation? A. Yes.

XQ. And taken no other action? A. Yes.

Mr. Somers: Objection. I don't think that's his testimony that he's taken no other action.

Mr. Wanger: Let me clarify that.

Hearing Officer: The objection is overruled.

XQ. (By Mr. Wanger) Mr. Scott, with reference to your last wage increase, I think you testified that you're currently receiving \$2.35? A. Right.

[218] XQ. And that you had received a ten-cent wage increase? A. Right.

XQ. When did you receive that? A. About a month ago.

* * *

XQ. Now, when you received that wage increase, did to your knowledge other employees receive a wage increase?

Mr. Somers: Objection. Now what's the relevance of this?

Hearing Officer: I will allow the question. The objection is overruled.

A. Just me and Donald Noiles.

XQ. So that it's fair to say that prior to the middle of March, you were receiving \$2.25? A. Right.

[219] XQ. And, if you know, do you know the wage rates of the employees in your department? A. No.

XQ. At that time? A. No.

XQ. Now, the Hearing Officer asked you about an instance wherein an employee would want some time off. Now, I think you testified that the employees would come to you, but then would have to go and ask Mr. Kabilian? A. Right.

XQ. So that Mr. Kabilian has final say as to time off? A. That's right.

* * *

XQ. Now, Mr. Scott, with respect to the one instance wherein you recommended a wage increase, that was for Mr. . . A. Donald Noiles.

XQ. And that was approximately when, if you can remember? [220] A. The same time that I had a raise.

XQ. Well, I am interested in the time sequence. You went to who, Mr. Kabilian? A. Kabilian, right.

XQ. And told him that this fellow wanted an increase? A. Right.

XQ. And when did he get the increase? A. The same time that I got mine.

XQ. He got it the same day that you got yours? A. Right.

XQ. Now, Mr. Scott, with respect to the Hearing Officer's questions regarding the so-called Management meetings, isn't it true that these meetings that you attend are restricted to your particular department? A. Right.

XQ. They are not general meetings? A. No.

XQ. They are departmental meetings? A. Yes.

XQ. And you attend solely the meeting with respect to your department? A. That's right.

Mr. Somers: What department are we talking about?

The Witness: The plating department.

Hearing Officer: The plating department. The plating [221] department is one of the departments of the products department Mr. Scott?

The Witness: Yes.

Mr. Wanger: At this time, I have no further questions. But I would like to reserve my right to take it up again.

Hearing Officer: Mr. Somers?

Cross-Examination

XQ. (By Mr. Somers) Mr. Scott, isn't it true that there are people outside of the plating department who participate in these management meetings? A. Outside of the plating department?

XQ. Right. Isn't Mr. Massey at these meetings? A. George and Alonzo, yes.

XQ. Massey and Morris? A. Yes.

XQ. And they are not in the plating department, are they? A. No.

XQ. They are in the products division? A. Right.

XQ. So that, in fact, these Management meetings are not the plating department, but they are the whole products division, isn't that right?

Mr. Wanger: If you know.

A. Yes, if I know, yes.

[222] XQ. Well, isn't that true that it's the whole product division that's present, the assistant foremen, the foremen, Mr. William and Mr. Berman? A. Oh, yes.

XQ. Right. Now, when you recommended an increase for Mr. Noiles, isn't it true that you said Mr. Noiles should receive the increase? A. Yes, I did.

XQ. And he received the increase? A. He did, yes.

XQ. Now, do you recall the incident when Mr. Washington — with Mr. Washington, at which time you told him if he put his coat on and left the plant, he was through? A. Yes, I did.

XQ. And why did you tell him that? A. Because he didn't want to help me.

XQ. And what happened when you told him that? A. He pulled his coat off, and he came back.

XQ. How many people do you have charge of in your area? A. Well, I have only two now because Nocero is phosphating.

XQ. Normally what would you have, three? A. Right.

XQ. And you're responsible for seeing that the flow of production in your area is running smoothly, isn't that right? A. That's right.

[223] XQ. And you go to these Management meetings, and you're asked how your production is coming in your area? Isn't that true? A. That's right.

XQ. And you're asked how the employees in that area are operating, whether they are doing their job, isn't that right? A. That's right.

XQ. And if there are any problems, you will tell the people present at that meeting what your problems are with those individuals, isn't that right? A. Say that again.

XQ. If you're having any problems with any of these three people who are working under you, you will at that time inform the people present of what your problem is, isn't that right? A. Well, most of the time we go to Charlie Kabilian — most of the time.

XQ. In other words, if you have a problem with the three people working under you, you will go to Mr. Kabilian? A. That's because they won't listen to me. They'd rather listen to Charlie.

XQ. But you're in charge of those three people, aren't you? A. That's right. I'm supposed to be, yes.

* * *

[224] XQ. Let me ask you this, do you recall a meeting with Noiles and Benny Steinberg and Chet Williams and yourself in which you discussed the fact that Noiles was complaining that Steinberg wasn't talking to him? A. Oh, yes, yes.

XQ. And at that time, do you remember that Chet Williams stated in front of all those people that you were run-

ning that room, and that you had charge over Noiles? A. Yes, I do.

XQ. This was about two or three months ago, isn't that true? A. Yes.

XQ. Now, also at these Management meetings, you talked about the quality of the work coming out of your area? Isn't that right? [225] A. Right.

XQ. And you talked about quality control? A. Right.

XQ. In fact, you fill out a quality control sheet, don't you? A. Yes, I do.

XQ. And what do you have to do in order to fill that out? A. I check the quality control list every hour.

XQ. I see. And you make a judgment as to the quality of that product? A. Right.

XQ. And you're the only one in your area that does that, isn't this true? A. Raymond Zagrafos is supposed to be doing it, but...

XQ. And he's an assistant foreman also, isn't he? A. Yes.

XQ. But Washington doesn't fill that out, does he? A. No.

XQ. And Noiles doesn't fill it out? A. No.

XQ. And Nocero doesn't fill it out? A. No.

XQ. Now, who are you directly responsible to? A. What do you mean?

[226] XQ. Who's above you? A. Charlie.

XQ. Charlie Kabilian? A. Right.

XQ. How much does Mr. Kabilian know about electro plating? A. I don't think he knows anything.

* * *

XQ. (By Mr. Somers) Certainly you know more about electro plating than the three people working under you, don't you? A. Yes.

[227] XQ. Now, when you check items that come out of the degreaser, aren't you checking, in addition to other things, aren't you checking for darkness in the oxidizing? A. Right.

XQ. And if it's unduly dark, then you'll go to the person who's doing the scratch brushing on that item. . .

A. No, I would change the oxide.

XQ. You will change the oxide? A. Right.

XQ. And who works with the oxide? A. Donald. Donald Noiles.

XQ. Will you show him that item that it's coming out dark? A. Yes, I would.

XQ. Would you tell him to watch it the other items to see that they don't have this problem? A. Yes.

* * *

[228] XQ. (By Mr. Somers) Do you recall a discussion during a Management meeting of the discipline of Mr. Noiles for smoking? A. Yes.

XQ. And what was he doing, smoking near the chemicals? A. Yes, he was.

[229] XQ. And how was that handled? A. Well, I went over and told him, I said to stop smoking because one ounce of cyanide would kill him.

XQ. I see. Now, prior to your going over discussing this with him, was there a discussion at one of the Management meetings concerning this? A. Yes, there was.

XQ. And at that time, didn't you say that you'd handle this in your own way? A. Yes.

* * *

[230] And after you have filled the tanks first with 1221, and there is still room in the tanks, don't you decide which items you're going to put in besides the 1221? A. Right.

XQ. So that's up to you? A. That's right.

XQ. So you are, in fact, deciding which items are being ran in addition to that specific item? A. After I put the 1221 in, yes.

* * *

[231] XQ. (By Mr. Somers) You did recommend that people be allowed to work overtime in your area? A. Yes.

XQ. Did you work overtime? On those occasions?
A. Yes.

Hearing Officer: Who is it that decides the work overtime, Kabilian, isn't it, who will decide what overtime is to be done in the department, Mr. Scott?

The Witness: Yes.

XQ. (By Mr. Somers) So on the line of command, as I understand it, Mr. Scott, is from Kabilian, who is your foreman, who you're responsible to is that right? A. Right.

XQ. To you as assistant foreman, and you have charge of the three people in your department, is that right?
A. I'm supposed to, yes.

* * *

[233] XQ. And when Mr. Kabilian comes in, and isn't it true that he will ask you many questions about electroplating? A. Sometimes, yes.

XQ. Because he's not familiar with it? A. Yes.

* * *

[234]

Recross Examination

XQ. (By Mr. Wanger) Mr. Scott, in answer to my brother's questions, you said at one point that you're supposed to be in charge of these men? A. Yes.

XQ. You did say "supposed?" That would indicate some doubt on your part at times?

Mr. Somers: Objection — leading.

Hearing Officer: I will allow the question. The objection is overruled.

A. Yes.

XQ. With respect to the smoking incident near the cyanide... A. Yes.

XQ. Mr. Noiles, was it? A. Yes.

XQ. ...refused to stop smoking, you would have to see Kabilian, is that right? A. Yes.

Mr. Somers: Objection — leading.

Hearing Officer: I will allow the question. Objection overruled.

Mr. Somers: I have an exception.

[235] XQ. (By Mr. Wanger) Now, with respect to the incident wherein Noiles wanted a wage increase, is it a fact that you went to Kabilian and told him that Noiles wanted a wage increase? A. That's right.

XQ. By the way, Mr. Scott, who's taking care of that department today? A. Willy Washington and Nocero.

XQ. So these are the only people in the department today? Is that right? A. Donald is in, but his back is injured.

XQ. They are performing all the duties that are normally performed in that department? A. Right.

XQ. Including yours? A. That's right.

Mr. Wanger: No further questions.

Recross Examination

XQ. (By Mr. Somers) Mr. Scott, when you had the problem with Willy Washington, you didn't go to Mr. Kabilian, did you? A. No, I didn't go to anyone.

XQ. Right. Right on the spot you told Washington if he put his coat on and left, he was through, didn't you? A. That's right, but he didn't leave.

* * *

[237] *Further Recross Examination*

XQ. (By Mr. Somers) Does Mr. Washington plate as much as you [238] do? A. No, he don't.

XQ. He probably does about ten percent of the volume that you do, isn't that true, in plating? A. That's right.

* * *

RAYMOND ZAGRAFOS

was called as a witness by and on behalf of the Employer and, having been first duly sworn, was examined and testified as follows:

[239] Hearing Officer: Please be seated. Give the Reporter your name and address?

The Witness: Raymond Zagrafos, 11 Westville Terrace, Dorchester.

Direct Examination

Q. (By Mr. Somers) Mr. Zagrafos, you're employed by Magnesium Casting Co.? A. Yes.

Q. How long have you been employed there? A. Nine months.

Q. And what's your title? A. Assistant foreman.

Q. Where? What department? A. In the buffing department.

Q. And is the buffing department part of the products division? A. Yes.

Q. Now, do you attend meetings weekly or bi-weekly? A. No, weekly.

Q. Weekly meetings? And who else attends these meetings? A. Scotty does.

Q. That's Ivory Scott? A. Yes. Al does and George.

Q. George Morris, Alonzo Massey? A. Right.

[240] Q. Could you give their full names? A. I didn't know their last names. I'm sorry.

Q. Who else attends? A. Chet Williams does, Charlie Kabilian does. Benny Steinberg and Harvey Berman.

Q. Now, do you recall during any of these meetings your duties being outlined to you? A. Yes.

Q. And were these duties outlined only as to you, or were they outlined as to others who were present? A. They were outlined to the assistant foremen who were there.

Q. Who are those people that you're talking about?
A. Ivory Scott, George Morris and Al.

Q. Al Massey? A. Right.

Q. Now, would you tell us who spoke and who outlined these duties? A. Both Harvey and Chet.

Q. And what did they say? A. Well, they told us in regards that we had the power if somebody was drinking if they were constantly coming in late or absent without an excuse or not doing as they are told, that we could dismiss them.

Q. What else did they say you could do? Did they outline your [241] responsibility with regards to the people working in your department?

Hearing Officer: I wish the record would reflect who gave this outline.

Q. Who spoke and gave that outline? Who told you all this? Who told you all these things? A. I can't remember. It was either Harvey or Chet.

* * *

Q. Now, how many people do you have in the buffing department? A. I believe ten.

Q. And in the buffing department, how many assistant foremen are there? A. In the buffing department?

[242] Q. Yes. A. Just myself.

Q. I see. Now, these ten include you? A. Yes.

Q. What do you do with regard to the day-to-day operation insofar as those other nine employees are concerned? A. Well, I make sure they are supplied. That's the first thing I do in the morning. I go upstairs and I get them their gloves, cotton gloves, anything else they need. I assign them to their work, which machines to go on during the day. And what we're doing to work on for the day.

Q. And what percentage of the time would you say that you actually perform production work? A. About ten percent.

Q. And what about the other 90 percent, what are you doing? A. Well, ten percent of the time I'm working, I'm on a wheel.

Q. Yes? A. Another ten percent I may be getting stock, and about 80 percent of the time I'm supervising.

Q. Now, have you ever recommended people for wage increases? A. Yes.

Q. Do you recall how many people or who they were? [243] A. Three people.

Q. Who are they? A. Michael Hastings, Otis Singleton, and one person I don't recall his name at all. All I know him is by Mousy.

Mr. Berman: Mousy for the record is Constantine Malonowski.

Q. Now, do you recall taking the names one by one, what did you do on Hastings with regard to the recommendation? Who did you go to? A. I went to Benny Steinberg.

Q. And what did you say to him? A. Well, I told him that Michael was doing good work on highlighting. He was one of our highlighters. And I believed he deserved the job for the quality of the work he was doing.

Q. Deserved what? A. He deserved a raise.

Q. Did he get a raise? A. Yes.

Q. Do you remember how long after you made the recommendation he got the raise? A. Two weeks.

Q. Did anyone ask you any questions about Hastings after that? [244] A. No.

Q. What about Singleton? A. Just about the same. He's also a highlighter.

Q. And who did you go to on that occasion? A. Bernard Steinberg.

Q. And what did you say at that time? A. Just about the same. What I said about Hastings.

Q. Did he get a raise? A. Yes.

Q. Do you recall how long after you made the recommendation he got the raise? A. About the same length of time.

Q. Do you recall when you recommended Hastings for a raise, how long ago it was? A. No.

Q. Well, was it three months ago, four months ago, a couple of weeks ago? A. It was about four months ago.

Q. About four months ago?

Hearing Officer: When?

The Witness: About four months ago.

Q. Do you recall when you made the recommendation for Singleton? A. It was about two weeks later.

Q. And what about Malonowski, do you recall when you made [245] that recommendation? A. It was about five months.

Q. Five months ago. A. Right.

Q. I see. And who did you go to on that occasion? A. I went to Harvey Berman.

Q. And what did you say? A. Well, I told him that Mousy was doing good work.

Q. Yes? A. And that he hadn't received a raise in a while. And I told him, you know, at that time he should get one.

Q. Did he get a raise? A. Yes.

Q. Do you remember how long after you made the recommendation he got the raise? A. One week.

Q. Have you ever had employees request. . .

Mr. Wanger: I'm sorry. I didn't hear the answer to that question.

Mr. Somers: One week.

Q. (By Mr. Somers) Have you ever had employees ask you if they could leave for the day? A. Yes.

Q. And what happened on those occasions? A. Well, I have [246] had Otis come up to me yesterday. He had the

hiccups, and he couldn't stop. He couldn't stop hiccuping. So I excused him for the day.

Q. Have you had it happen before? A. Yes.

Q. And what have you done on those occasions? A. I have let him go.

Q. Did you see anybody prior to letting him go? A. No.

* * *

[247] Q. Now, have you ever fired an employee? A. Yes.

Q. Who was that? A. Frank Angrasio.

Q. And how long ago was this? A. About four or five months ago.

Q. Why was he fired? A. He was buffing downstairs, and he left without telling either myself or Benny Steinberg that he was going up. And he just left his department, he walked away and didn't tell anybody, and he stayed upstairs.

[248] Q. I see, and what happened? A. I went upstairs and he told — and I told him if he didn't come back downstairs, I was going to fire him. So I fired him. He refused to go back down.

Q. How long ago was this? A. It was either four or five months ago.

Q. You attend these supervisory meetings on a weekly basis? A. Yes.

Q. What is discussed at these meetings? A. Quality of work, once in a while we discuss the employees.

Q. What do you discuss when you discuss the employees? A. Well, we maybe discuss somebody who isn't working too well; or if we have a problem, we'll discuss the problem.

Q. Do you discuss the performance of the individual employees? A. Once in a while.

O. Do you discuss the flow of production? A. Yes.

O. In your area? A. Yes.

Q. Have you ever transferred an employee from one job to another? A. Many times.

Q. In the course of the day, do you do this? A. Yes.

[249] Q. Every day? A. About three or four times out of a week I will have to change them.

Q. I see. Have you ever transferred an employee between the buffing department and the plating department? A. Yes.

Q. Who was that? A. Nocero.

Q. And how is that done? A. Well, I would go in and I'd ask Scotty if he needed him.

Q. Yes? A. If not, could I take him and put him in back for phosphating.

Q. And what happens? A. Well, if he needed him in there, he didn't go back phosphating. If he didn't need him, I'd take him out and put him in the back.

Q. Would Scotty go to somebody before he'd give you an answer? A. No.

Q. Have you had — strike that. Do you check the work of the employees working under you? A. Yes.

Q. And what do you do when you check it? How is that done? [250] A. Well, I will go over at random, and I will pick up a few of the pieces at random, check it out, and see how, you know, how they are doing. Either it may be buffing an article, or they may be cleaning it.

Q. And you — if you find any problem with that item, what will you do? A. I will tell the employee about it, and have him correct it.

Q. Do you assign the employees to the particular jobs? During the day? A. Yes.

Q. Now, you stated that your duties were outlined during the Management meetings. In the outline of your duties, did that also include your day-to-day function with regard to the employees? Working under you? What you were

supposed to do with regard to those employees? A. I don't understand the question. I'm sorry.

Q. Were you told that you were in control of the employees in your area? A. Yes.

Q. And were you told that you had any responsibility for them? A. Did I have . . . any responsibility?

Q. Were you told that you did have responsibility for them? [251] A. Yes.

Q. Was this repeatedly emphasized to you as to what your responsibilities were — to you as well as to the other foremen — during these meetings? A. Yes.

* * *

Q. Now, is there a work schedule put up by Mr. Kabilian in your department the same as in the other departments? As to what is [252] going to be run the following day, sir? A. He puts up what we want run first.

Q. What he wants run first, is that it? A. Right.

Q. And that schedule is put up on the wall? A. It's put up in every department, yes.

Q. And you follow that schedule? A. Right.

Q. What's your rate of pay paid by the hour? A. \$2.35 an hour.

Q. \$2.35. Do you punch a clock? A. Yes.

Q. How much did you start out at? Did you say you were hired nine months ago? A. Yes, sir.

Q. And what was your rate? A. I believe it was either a dollar. . .

Mr. Somers: Objection.

Hearing Officer: Overruled.

Q. Your rate was what? A. It was either \$1.75 or \$1.80.

* * *

[253] Q. (By the Hearing Officer) About five months ago? Do you punch a clock? A. Yes.

Q. Do the other employees punch a clock in your department? A. Yes.

[254] Q. You stated about ten of them? A. Yes.

* * *

Q. From the time you punch in at 7:00 o'clock in the morning just what you're doing? A. When I first go in, I go upstairs. I get the gloves for them. I make sure they have enough trucks downstairs, so we can put the articles on it to send the product upstairs. We put them on racks, you know. It's on the truck and the racks are on it. And we send it upstairs. I make sure they have enough racks downstairs. And I assign the employees to their machines, which machines they are going to work on for that day. And if we have anything special, a lot of times I will do it myself. I will either buff it or clean it, whichever has to be done on it. I make sure all the racks have gone into the plating room. I check the rack in the plating room to make sure we keep it full. This is in Scotty's department. We send the work into his room. [256] At the end of the day, I shut out all the lights. I shut the degreaser off. That's about it.

* * *

[257] Hearing Officer: All right, Mr. Wanger.

Cross Examination

XQ. (By Mr. Wanger) Mr. Zagrafos, you testified that with respect to wage recommendations, you made three of them? A. Yes.

XQ. And you further testified it took two weeks in two instances for those increases to be effectuated? A. Yes.

XQ. Is that because the higher echelon personnel of the Company had to check on the employee you recommended? A. No, sir.

* * *

[261]

Redirect Examination

Q. (By Mr. Somers) Mr. Zagrafos, does Mr. Kabilian punch a time clock? A. Yes.

Q. Do you know whether Mr. Steinberg does? A. Yes.

Q. Does he? A. Yes.

Q. And do you know what your pay is in relation to the other employees working under you, what the differential is? A. Yes.

Q. How much is that? A. About 50 cents.

Q. About 50 cents? A. Yes.

[262] Hearing Officer: About 50 cents between whom and who?

Mr. Somers: Between he and the other employees working under him.

* * *

Q. (By Mr. Somers) Do you recall attending any policy meeting with Management regarding drinking problems in the plant? A. Yes.

Q. Can you say what occurred at that time? A. Well, we had a situation where some of the employees were bringing in bottles and drinking. So we were informed that. . .

Q. Who was present? A. Who was present?

Q. Yes. All of us.

[263] Q. Well, who is. . .

Hearing Officer: Who is all of us?

Q. The same group that you mentioned as being in the supervisory meetings previously? A. Right.

Q. How long ago was this meeting? A. I can't recall.

Q. Was it within the last two months, three months?

A. Within the two months.

Q. All right. Continue. Tell us what happened? A. We were told about the situation of drinking, that somebody was found with a bottle on them. I don't recall who it was. And that this couldn't continue because it was a bad

reflection on everybody; and that if anybody was caught drinking again or with a bottle, I should say with a bottle on the premises, they were to be let go immediately.

Q. And was this policy set during the meeting? A. Yes.

Q. After was there a discussion with all of you?
A. Yes.

Q. Did you participate in that discussion? A. Yes.

Q. Did Mr. Massey participate? A. I believe so.

[264] Q. Mr. Morris? A. I believe we all did.

* * *

[265] *Further Examination*

Q. (By Mr. Paone) Three employees received raises? Did they come to you first and ask you for a raise?
A. Yes, sir.

Q. And what did you tell them? A. I didn't tell them anything. I said I'd see what I could do.

Q. Did you tell them that you'd talk to Mr. Steinberg about it? A. No.

Q. You mean — What do you mean when you told them you'd see what you could do? A. Well, what I mean was I'd tell Benny about their performances, Benny being Mr. Steinberg, and you know, I'd ask for them to be put in for a raise.

* * *

[267] Q. Tell me, what did — You went to Steinberg and mentioned [268] to him about these that wanted raises?
A. Two.

Q. Two? A. Yes.

Q. Wasn't it three? Who was the third one? Who did you go to for the third one? A. Harvey Berman.

Q. And that was for the . . . A. That was for Mousy.

Q. The floor boy? A. Yes.

Q. How come you went to Harvey for the floor boy and not Mr. Steinberg? Does he come under Harvey's jurisdiction. . . A. I imagine he does, yes.

Q. And what did Mr. Berman tell you — Mr. Steinberg tell you? A. What did he tell me in regards to the raises?

Q. Yes. A. He told me he was going to put in for them.

Q. Did he tell you how much? A. No. I asked him for a dime. I asked him for, if — at the time I believe it was Hastings — could receive a dime more than his pay; and he said he'd put it in for him.

Q. Did he come back to you later — Mr. Steinberg? A. He came back later and told me they had gotten the raise.

[269] Q. Can you tell me in your department if one of the employees — what's the procedure when one of the employees doesn't want to — has got some personal business to take care of and can't come into work, are they supposed to call in the department and notify the Company that they won't be in that day? A. If they call up that morning, right. That's the procedure.

Q. And generally, who would they call? Who are they to notify that they won't be in for work? A. They will either notify Charlie Kabilian or myself, or they will leave a message right in the office and just call up and tell them they won't come in.

Q. Who will they generally ask for, Charlie Kabilian? A. Either Charlie Kabilian or myself.

* * *

[271] Q. Did he tell you — I'm talking about Mr. Williams now — did Mr. Williams tell you that anyone who, that if anyone of you saw — talking to you people at the meeting, if anyone saw employees with a bottle they were to be reported to the front office? A. No.

[272] Q. What did he say? A. He didn't say it was supposed to be immediately reported to him. What he said

was if we saw anybody with a bottle, that they were supposed to be fired right on the spot.

Q. Did he say who was going to fire them? A. No.

Q. Who? A. The assistant foremen or the foremen or himself, if he caught somebody.

* * *

[276]

Examination

Q. (By the Hearing Officer) ***

[277] Q. Well, I mean, these things that you're working on are things that have been put on — referring to things, it's a schedule that Mr. Kabilian had put up the day before? Am I right? A. Right.

Q. Now, if you finish all the work that Mr. Kabilian has set out on the schedule there before the shift is completed, what happens then? A. What would happen?

Q. Yes. A. Then I would assign more work.

Q. And how would you go about that? Would you go see Mr. Kabilian for another sheet? A. No. I'd start working on something else that would be needed upstairs. Start working on maybe 1311's or 1221's, or I'd start sending in — have the rack up for coasters and inserts.

* * *

[279]

Further Redirect Examination

Q. (By Mr. Somers) In making up this list that's posted in the [280] morning, do you work with Mr. Kabilian? I mean the list that's made up in the evening for the previous day? A. Right.

Q. Do you work with Mr. Kabilian in making up that list? A. I do.

Q. Now, does that list say who's going to work on what item? A. No.

Q. Who decides that? A. Either Charlie or myself.

* * *

[287] Mr. Somers: With regard to the Company's position, we take the position that the assistant foremen are supervisors within the meaning of the Act. And we take no position at this time on the record-keeping [288] department, shipping, receiving and truck driver. We will examine the record and determine what position we will take. We may be in agreement with the Union. We may not. As for delay in the hearing, I think the record will show that the Employer completed his case perhaps two weeks ago. At that time the Union requested a postponement to a later date. And we are here today because the Board saw fit to subpoena a man who they understood the Union was going to subpoena previously.

* * *

RESPONDENT'S EXHIBIT NO. 1(a)
PLATING DEPARTMENT
QUALITY CONTROL DAILY CHECK LIST

Date 3/18/68

HOUR OF DAY

Problem List	7:30	8:30	9:30	10:30	11:30	12:30	1:30	2:30	3:30	4:30	Causes	Action Taken
1. Blisters	x	x	x	x	x	x	x	x	x	x		
2. Rough Deposit — Heavy Light												
3. Color	x	x	x	x	x	x	x	x	x	x		
a. Plating	x	x	x	x	x	x	x	x	x	x		
b. Oxidizing	x	x	x	x	x	x	x	x	x	x		
c. After Oxidizing	x	x	x	x	x	x	x	x	x	x		
4. Stains	x	x	x	x	x	x	x	x	x	x		
a. Spotting	x	x	x	x	x	x	x	x	x	x		
b. Finger Marks	x	x	x	x	x	x	x	x	x	x		
c. Dryer	x	x	x	x	x	x	x	x	x	x		
5. Scratch Brushing	x	x	x	x	x	x	x	x	x	x		

Causes

1. Dirty Castings
2. Improper Temperature
3. Current Off
4. Improper Rinsing
 - a. Before Plating
 - b. After Plating
5. Dirty Gloves
6. Wetting Agent Dirty
7. Oxide Changed when necessary
8. Color sample for Gold and Oxide
9. Dirty Degreaser Dryer

Remarks: Improper temperature on tank #1 at 7:00 A.M. Current off on the soap at 7:00 A.M. (defective fuse) Net castings on some of the work.

RESPONDENT'S EXHIBIT NO. 1(b)
PLATING DEPARTMENT
QUALITY CONTROL DAILY CHECK LIST

Problem List	7:30	8:30	9:30	10:30	11:30	12:30	1:30	2:30	3:30	4:30	Causes	Action	Taken
1. Blisters	X	X	X	X	X	X	X	X	X	X			
2. Rough Deposit — Heavy Light													
3. Color	X	X	X	X	X	X	X	X	X	X			
a. Plating	X	X	X	X	X	X	X	X	X	X			
b. Oxidizing	X	X	X	X	X	X	X	X	X	X			
c. After Oxidizing													
4. Stains	X	X	X	X	X	X	X	X	X	X			
a. Spotting	X	X	X	X	X	X	X	X	X	X			
b. Finger Marks	X	X	X	X	X	X	X	X	X	X			
c. Dryer	X	X	X	X	X	X	X	X	X	X			
5. Scratch Brushing	X	X	X	X	X	X	X	X	X	X			
<i>Causes</i>													
1. Dirty Castings													
2. Improper Temperature													
3. Current Off													
4. Improper Rinsing													
a. Before Plating													
b. After Plating													
5. Dirty Gloves													
6. Wetting Agent Dirty													
7. Oxide Changed when necessary													
8. Color sample for Gold and Oxide													
9. Dirty Degreaser Dryer													

Remarks: At 7:00 A.M. a new heater was put in the soap.

(s) Ivory Scott

RESPONDENT'S EXHIBIT NO. 1(c)
PLATING DEPARTMENT
QUALITY CONTROL DAILY CHECK LIST

Date 3/25/68

HOUR OF DAY

Problem List	7:30	8:30	9:30	10:30	11:30	12:30	1:30	2:30	3:30	4:30	Causes Action Taken
1. Blisters	x	x	x	x	x	x	x	x	x	x	
2. Rough Deposit — Heavy Light											
3. Color	x	x	x	x	x	x	x	x	x	x	
a. Plating	x	x	x	x	x	x	x	x	x	x	
b. Oxidizing	x	x	x	x	x	x	x	x	x	x	
c. After Oxidizing	x	x	x	x	x	x	x	x	x	x	
4. Stains	x	x	x	x	x	x	x	x	x	x	
a. Spotting	x	x	x	x	x	x	x	x	x	x	
b. Finger Marks	x	x	x	x	x	x	x	x	x	x	
c. Dryer	x	x	x	x	x	x	x	x	x	x	
5. Scratch Brushing	x	x	x	x	x	x	x	x	x	x	

Causes

1. Dirty Castings
2. Improper Temperature Low Temperature #1
3. Current Off
4. Improper Rinsing
 - a. Before Plating
 - b. After Plating
5. Dirty Gloves
6. Wetting Agent Dirty
7. Oxide Changed when necessary
8. Color sample for Gold and Oxide
9. Dirty Degreaser Dryer

Remarks: Low temperature on #1 All day because of bad heaters Tank #2 plating light.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Francis V. Paone, a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.¹

The Employer made a special appearance at the hearing, contesting the fact that a hearing was scheduled while a charge in Case No. 1-CB-1362 filed by it alleging a violation of Section 8(b)(1)(A) by the Petitioner was pending and no request to proceed was filed. The Employer premises its argument on Section 11830 of the Board's Field Manual. Said Section deals with concurrent "R" and "C" cases and states that the Board has a general policy of not proceeding in any representation case during the pendency of an unfair labor practice charge affecting some or all of the employees involved in the concurrent petition and where the charging party is also a party to the representation case. The undersigned, prior to the opening of the hearing, denied the Employer's request for a postponement and thereafter the Board upheld this action as a proper exercise of discretion. See *Columbia Pictures Corporation*, 81 NLRB 1313, 1314-15. *St. Louis Cordage Mills*, 170 NLRB No. 7, 67 LRRM 1378, 1379-80.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the

¹ After the close of the hearing, the Employer filed a motion to correct the record. Said motion is granted.

meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

In Case No. 1-CB 1362, the Employer charged, in substance, that the Petitioner through certain supervisors restrained and coerced employees by soliciting them to sign union cards and by distributing union campaign literature among employees. Investigation of these charges disclosed that the alleged supervisors were Obedia Ford and Ivory Scott, two of the individuals whose status is decided in the instant matter. The undersigned dismissed the charges in Case No. 1-CB 1362 on May 8, 1968, on the grounds that the investigation had disclosed that Obedia Ford was not a supervisor and that, assuming without deciding that Ivory Scott was a supervisor, he was not acting as an agent of the Union. On May 21, 1968, the Employer, Charging Party in 1-CB-1362, took an appeal from said dismissal, which appeal is still pending. On April 2, 1968, the Employer requested a continuance of the instant matter pending the investigation of Case No. 1-CB 1362. As indicated above, this request was denied on May 3, 1968, by telegram and the undersigned's action was thereafter affirmed by the Board. In its letter requesting a continuance and at the hearing, the Employer, *inter alia*, contended that the evidence of interest submitted by the Petitioner in the instant case was tainted because of the activity alleged in Case No. 1-CB-1362 and that, therefore, the petition should be dismissed. The showing of interest is a matter for administrative determination and, of course, not litigable. *O. D. Jennings & Company*, 68 NLRB 516.

Based upon a concurrent investigation of the charge in Case No. 1-CB-1362 and of the allegation that the showing of interest was tainted, the undersigned is administratively satisfied that the Petitioner's showing of interest was adequate and not tainted as urged by the Employer.

4. The Employer is engaged in the manufacture, sale and distribution of various desk accessories and related products at its Hyde Park, Massachusetts, plant, where it employs approximately 250 employees in the unit found appropriate herein. The unit description is in accord with the agreement of the parties except that the Petitioner would include seven individuals classified as assistant foremen, the employees of the records-keeping department, the employees of the shipping and receiving department and the truck driver. The Employer would exclude the seven assistant foremen as supervisors and at the hearing took no position with respect to the employees of the records keeping department, the shipping and receiving department and the truck driver. In its brief, the Employer agreed to the inclusion in the unit of these categories of employees and they are so included.

William Adams, Obedia Ford and Norman Sawyer, classified as assistant foremen, work in the die casting department under the supervision of the general foreman, Malcolm Emack. In addition, there are three shift foremen. The record demonstrates that these three employees are hourly paid, punch a time clock and spend the entire portion of their work day operating die casting machines. This work is no different from that of other employees engaged in the operation of similar machines. With the sole exception of receiving ten cents per hour more than other employees in their department, the aforesaid employees receive the same benefits and have similar working conditions as other die casting machine operators. They do not possess any authority to hire, fire, suspend, promote,

transfer or discipline employees, nor do they responsibly direct any other employee or otherwise engage in any conduct which affect the employment status of any other employee in their department. The record does not contain any evidence demonstrating that these individuals possess any of the indicia of a supervisor. It appears that the Employer has abandoned contest of this issue in its brief, arguing *only* the status of assistant foremen in the production division. On the basis of the entire record, it is found that *Adams, Ford and Sawyer* are employees eligible to vote and they are included in the unit. *UTD Corporation*, 165 NLRB No. 48; *The Singer Company*, 170 NLRB No. 165.

Alonzo Massey and George Morris are classified as assistant foremen in the assembly and packaging area. In addition, they also are known as "floor boys." They are under the immediate supervision of Benjamin Steinberg, foreman. Besides Massey and Morris, there are six to eight women working in this department. Their primary function is to keep the women supplied with work, to inspect the products and to refer any defective materials to Steinberg. The record indicates that Steinberg is continually in the area and repeatedly checks the work of Massey and Morris as well as the work of the women in this department. In addition to the above tasks, Massey and Morris spend time on various jobs such as the buffing and cutting wood. Massey and Morris are hourly rated, punch a time clock and, except for receiving a rate higher than the other employees in their department, share the same benefits and working conditions. They have no authority to hire, fire, suspend, promote, transfer or discipline employees, nor do they responsibly direct any employee or otherwise engage in conduct which would affect the employment status of any employee in their department. The fact that they attend bi-weekly meetings classified in the record as "supervisory meetings" or "management meetings," which are

attended by the assistant to the president, the assistant plant manager, the foreman in this department, another foreman and other assistant foremen, is not sufficient grounds to find that Morris or Massey possess the statutory indicia of a supervisor. The primary function of these meetings appears to provide for the regulation of and to discuss production problems although there was evidence that the disciplining of employees was also taken up. It is found that both *Alonzo Massey* and *George Morris* are employees eligible to vote and they are included in the unit. *UTD Corporation, supra; The Singer Company, supra.*

The remaining employees in dispute are *Ivory Scott* and *Raymond Zagrafos*. Both are titled "assistant foremen" and report to Charles Kabilian, foreman. *Scott* is hourly rated, punches a time clock and works in the electro-plating department with three other men. He performs certain set-up operations of a routine nature and keeps certain production records. The Employer provided *Scott* with night school training in electro-plating, which training makes him more experienced in this operation than any one else in his department. *Scott* communicates with Kabilian as to the progress of work in the department and receives certain assignments and instructions from him. *Scott* testified that he did not have the authority to hire, fire, suspend, layoff, recall, promote, discipline or otherwise engage in any course of conduct that would affect the employment status of any employee in his department. In this respect, the Employer's assistant to the president testified that *Scott* possessed such attributes and referred to an incident wherein the Employer contends that *Scott* warned an employee that he would be discharged. Like *Morris* and *Massey*, *Scott* has participated in the so-called "supervisory" or "Management meetings." Assuming, *arguendo*, that *Scott* warned the employee concerning discharge, it is found that this incident is too isolated to

predicate a finding of supervisory status. Accordingly, on the basis of the record as a whole, it is found that Scott does not possess the indicia of a supervisor and he is found to be an employee eligible to vote and included in the unit. *UTD Corporation, supra; The Singer Company, supra.*

Zagrafos is under the direction of Kabilian and works in the buffing department. In addition, there are seven men and two women employed in this department. *Zagrafos* is hourly paid, punches a time clock and receives an hourly rate higher than the other individuals in his department but otherwise enjoys similar benefits and working conditions. *Zagrafos* testified that he spends eighty percent of his time "supervising" the work of the other nine individuals, ten percent performing production work and the remaining ten percent in obtaining stock. He also testified that he has recommended three individuals for wage increases and that, in fact, they did receive the increases. Additionally, *Zagrafos* testified that he has on one occasion fired an employee and has excused employees from working on other occasions. The record indicates that, while *Zagrafos* may receive general instruction from Kabilian as to work in his department, he makes specific determinations as to what employees shall perform the work and in what order. *Zagrafos* also attends the so-called "management and/or supervisory meetings." On the basis of the record as a whole, it is found that *Zagrafos* has the authority to discharge employees, to effectively recommend wage increases and to responsibly direct the employees in his department. Accordingly, it is found that *Zagrafos* is a supervisor within the meaning of the Act and he is excluded from the unit. *Research Craftmex Corporation*, 129 NLRB 723, 725, 726.

Accordingly, the undersigned finds that the following employees constitute a unit appropriate for the purposes

of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees of the Employer at its Hyde Park, Massachusetts, plant, including the records keeping department employees, shipping and receiving employees, and the truck driver, but excluding office clerical employees, professional employees, guards and supervisors² as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility

² Based upon the record and the stipulation of the parties, the following-named individuals are found to be supervisors and, accordingly, are excluded from the unit: *Frederick Loder*, plan manager; *Kenneth Sullo*, plant manager and quality control engineer; *Cliff Thornton*, industrial engineer; *Andrew Scott*, die casting engineer; *Abe Bunshoff*, plant and maintenance engineer; *William Flynn*, assistant plant manager; *Chester Williams*, assistant plant manager; *G. Garner*, quality control manager; *Frank Jackson*, quality control manager; *Carl Larson*, production and planning manager; *Malcolm Emack*, general foreman, die casting; *Herbert Davis*, *Darnel Johnson* and *Adam Smith*, shift foremen, die casting department; *Raymond Nichols*, day foreman, trim department, *Stanley Rejunas*, afternoon foreman, trim department; *Anthony Gangemi*, foreman, toolroom; *Don Beech*, foreman, general maintenance department; *Charles Jordan*, foreman, die casting maintenance; *Charles Kabilian* and *Bernard Steinberg*, foreman, products department; *Paul LaFond*, *John Smolinski* and *Mel Fontez*, shift foremen, M-525 department; and *Eugene Lyons*, foreman, shipping and receiving department.

period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently discharged.³ Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the United Steelworkers of America, AFL-CIO.

Original signed by:

ALBERT J. HOBAN

Regional Director, Region One

Dated May 22, 1968

at Boston, Massachusetts

REQUEST FOR REVIEW

Comes now the Employer, Magnesium Casting Co., and pursuant to Section 102.67 of the Board's Rules and Regulations hereby requests that the Board review the Decision and Direction of Election of the Regional Director, Region

³ An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, John F. Kennedy Federal Building, Boston, Massachusetts 02203, on or before May 29, 1968. Accordingly, please furnish two copies of the list. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

One, dated May 22, 1968 since the Decision on the factual issue of the supervisory status of employees Ivory Scott, Alonzo Massey and George Morris is clearly erroneous on the record and such error prejudicially affects the rights of the Employer.

The line of responsibility runs from Harvey Berman, products manager, to Chester Williams, assistant plant manager, to Bernard Steinberg and Charles Kabilian, both foremen and to Raymond Zagrafos, Ivory Scott, Alonzo Massey and George Morris, assistant foremen respectively in metal finishing, electro-plating, assembly and packaging (tr. pp. 34-35).

I. *The Employer Submits That Assistant Foreman Ivory Scott Is a Supervisor Within the Meaning of the Act.*

A. That Scott is hourly rated and punches a time clock is undisputed. This creates no distinction between Scott and Raymond Zagrafos who was found by the Regional Director to be a supervisor, and foremen Kabilian and Steinberg, who both parties stipulated are supervisors within the meaning of the Act.

B. That Scott performs set-up operations and keeps production records is also not disputed; however, the set-up operations are *not* of a "routine nature" and the production records are *not* mere recordings of production quantity or time. Scott was specially trained at the Employer's expense at Massachusetts Institute of Technology so that he could mix and check chemical solutions, take PH readings and moderate temperatures (tr. p. 226). He has full charge of this process since his foreman, Charles Kabilian, has little, if any, knowledge of plating operations (tr. pp. 103, 215). The "production records" are in fact quality control records which require Scott to judge an employee's performance and, where he finds an employee errs in his job, to correct that employee (tr. p. 225; Employer's Exhibits 1(a), (b) and (c)).

C. That Scott testified that he did not have the authority to hire, fire, suspend, lay off, recall, promote, discipline or otherwise engage in any course of conduct that would affect the employment status of any employee in his department is clearly erroneous. The entire record reveals that Scott warned employee William Washington that if he did not assist Scott and went ahead with his intention to put on his coat and leave the plant, he was fired. Washington, recognizing Scott's authority, took off his coat and assisted Scott (tr. p. 222). Scott did not discuss his action with others in management prior to making the statement (tr. p. 235). Scott was later commended for his action at one of the weekly management meetings he attends. The Regional Director contends "this incident is too isolated to predicate a finding of supervisory status." It is respectfully submitted that since Scott has been an assistant foreman for approximately seven months and there is no evidence of discharges in his department, the incident is in fact *not* isolated. According to the reasoning of the Regional Director, severe disciplinary problems must occur more frequently in order to prove one's authority.

In judging the alleged supervisory status of some employees, the Circuit Court of Appeals for the Eighth Circuit stated in *Matthews & Co. v. NLRB*, 61 LRRM 2070, at 2072.

It is well settled law that "(this section is to be interpreted in the disjunctive * * * and the possession of any one of the authorities listed in Section 2(11) places the employee invested with (such) authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F 2d 385, 387, 24 LRRM 2350 (6 Cir.) cert. denied, 338 U.S. 899, 25 LRRM 2129. Moreover 2(11) "does not require the exercise of the power described for all or any definite part of the employee's time. It is the existence of the power which determines the classification," *Id.*, at 358. Accord, *NLRB v. Edward G.*

Budd Mfg. Co., 169 F. 2d 571, 575, 576, 579, 22 LRRM 2414 (6 Cir.), cert. denied 335 U.S. 908, 23 LRRM 2228; *NLRB v. Leland-Gifford Co.*, 200 F 2d 620, 626, 31 LRRM 2196 (1 Cir.).

Furthermore, the record discloses that the company does not suspend employees and that no layoffs have occurred since August, 1967, when Scott took his position.

D. The Regional Director neglects to discuss the other facts that lend support to the Employer's position that Scott is a supervisor.

1. Scott attends weekly meetings of the Products Division with other members of management, including Harvey Berman, Products Division Manager, Chester Williams, assistant plant manager, foremen Charles Kabilian and Bernard Steinberg, and assistant foremen Raymond Zagrafos, Alonzo Massey and George Morris (tr. p. 35). At these meetings the work for the past week is discussed, personal problems are reviewed, the assistant foremen evaluate the employees working under their direction insofar as their performance and behavior is concerned, and policy is set (tr. pp. 36, 162, 172). Scott testified that the performance of employees is discussed at the management meetings (tr. pp. 214-215, 223). At these meetings the assistant foremen have recommended hiring more help (tr. p. 39). The company policy on drinking or possessing liquor in the plant was set at one of these meetings following discussions recommendations of all those present (tr. pp. 262-263).

3. According to Scott, the responsibility for seeing that production runs correctly in the electroplating area is his own (tr. p. 222). The record reveals that Scott's authority was explained to the employees in his area when they were told that Scott was running

the room and he had charge over the employees (tr. p. 224).

4. Scott possesses the authority to discipline employees. Scott testified that at a management meeting he insisted on handling in his own way the problem of one of his employees who was smoking near the chemicals, and he did so. (tr. p. 229).

5. Scott has recommended a wage increase for employee Donald Noiles which Noiles received (tr. pp. 40, 219, 222). No independent investigation followed the recommendation (tr. p. 98).

6. Scott, together with other assistant foremen, has transferred employees (tr. pp. 75, 248-249).

That Scott denied this authority in direct examination is understandable, since his testimony was colored by his bias in favor of the petitioner, which was made the subject of an 8(b)(1)(A) charge in Case No. 1-CB-1362, which is discussed in the Regional Director's Decision.

In summary, the Regional Director has failed to thoroughly examine the record and to note that Ivory Scott does in fact possess the authority to discharge, discipline, direct and transfer employees and to recommend them for wage increases. Additionally, Scott participates fully in meetings with other members of management at which personnel performance and problems are discussed and Scott offers his own evaluations and recommendations.

II. The Employer Submits That Assistant Foremen Alonzo Massey and George Morris Are Supervisors Within the Meaning of the Act.

A. That the primary functions of Massey and Morris as described by the Regional Director are to keep the women working in their department supplied with work, inspect the products and refer defective materials to foreman Steinberg is clearly erroneous. According to Morris' own testimony, he has control over the assembly and packaging of

the gift line (tr. p. 171), assigns work, and requests work for his people if they are not in his opinion sufficiently occupied (tr. pp. 171, 179, 181). In addition, he orders stock and oversees the quality coming from his department (tr. pp. 182-183, 185). Like Scott, he fills out a quality control check list and corrects employees' mistakes, (tr. pp. 182-183).

Alonzo Massey testified that he keeps the women supplied with materials and makes sure they are doing their jobs correctly (tr. pp. 138-139). He checks the quality of each employee's work and warns them if they are performing their jobs improperly (tr. , 147, 159).

B. That Massey and Morris have no authority to fire, transfer or discipline employees, or responsibly direct any employee or otherwise engage in conduct which would affect the employment status of any employee in their department is incorrect. The record is clear that Massey and Morris possess the authority to discharge employees (tr. pp. 37, 177, 216, 240, 262-263). Both have the authority to transfer employees and assign work (tr. pp. 145, 179). Massey testified that his foreman, Steinberg, must request Massey's permission to use an employee in Massey's area (tr. p. 145). Massey related a conversation with assistant plant manager Williams in which Massey was told to handle all personnel problems in his area himself since they were his own responsibility (tr. p. 157). Massey, in fact, resented any interference with that authority (tr. pp. 157-158).

Morris testified that he has the authority to discipline and the responsibility to control his employees. He referred to specific incidents when he had spoken individually to employees and told them to stop smoking and reduce their talking (tr. p. 184).

III. *Issues*

Are assistant foremen Scott, Massey, and Morris supervisors within the meaning of the Act?

IV. *Employers Position'*

The assistant foremen have the authority to discharge, transfer, assign effectively, recommend for raises, discipline and responsibly direct other employees and they report and recommend personnel actions and policies; therefore they are supervisors and must be excluded from the unit.

V. *Argument*

The assistant foremen are all vested with the authority of supervisors within the meaning of the Act and have in fact exercised that authority.

It is undisputed that the assistant foremen attend weekly supervisory meetings where personnel problems, including discipline, morale, and work rules are discussed, as well as personnel needs, and decisions are made as to personnel policy and production. The judgment and advice of the assistant foremen are constantly relied upon by other members of management. Contrary to the Regional Director's determination, it has been repeatedly held that attendance at periodic meetings of supervisory personnel is strong indicia of supervisory authority, *Borden Co.*, 157 NLRB No. 93, 61 LRRM 1467, 1469; *Watkins Furniture Co.*, 160 NLRB No. 20, 62 LRRM 1599; *Heck's Inc.*, 156 NLRB No. 73, 61 LRRM 1128.

Furthermore, the evidence discloses that the assistant foremen are responsible for their operations—overseeing production and directing the work force. Among their duties are seeing that work scheduled to be done is distributed and produced, moving employees from job to job, transferring employees and checking their quality—all of which require the use of independent judgment and are not merely routine or clerical in nature. Such functions clearly indicate supervisory authority. *Johnson Metal Products Co.*, 161 NLRB No. 76, 63 LRRM 1362; *Regency Electronics, Inc.*, 169 NLRB No. 49, 67 LRRM 1308; *Borden Co., Supra.*

In *Irving Air Chute Co., Inc.*, 149 NLRB 62 , 635, the trial Examiner stated, and his findings were adopted by the Board:

"Through both Lee and Gofgosky perform production work, their duties include not only production but also the overseeing, on a regular basis, of the work of the employees in their departments. In this capacity they are required to check the work and instruct the employees on how to perform it and they are responsible for seeing that the orders of Mathewson are carried out. Moreover, the employees themselves, as in the case of Kinner, were told by Mathewson that they had to obey the instructions of the leadmen.

Accordingly, I conclude and find that both Wayne Lee and John Gofgosky are supervisors within the meaning of the Act."

Moreover, the Regional Director neglects the evidence which explicitly indicates that the Employer held out the assistant foremen to be supervisors and to have control over their respective operations, and the employees understood this, i.e. Noiles and Washington, by their conduct and that of the Employer, clearly indicated such recognition of their assistant foreman's authority, see *Harvey Aluminum (Inc.)* 156 NLRB No. 115, 61 LRRM 1260.

That the assistant foremen recommend pay increases and such recommendations were followed without independent investigation by the Employer is undisputed. In *Home Exterminating Co.*, 160 NLRB No. 108, 63 LRRM 1163, the Board, finding an employee to be a supervisor, stated:

"He has no authority to hire, discharge, or discipline employees, but the record indicates that his personnel recommendations would probably be effective without an independent investigation."

Certainly the evidence in the immediate case discloses the

assistant foremen have considerably more authority than that outlined in the *Home Extermining* case since Scott, like Supervisor Zagrofos, effectively recommended a wage increase. In addition, the evidence establishes that they also have the responsibility of directing the work in their particular operation where they act on their own appraisal of the skills and experience of the employees, assigning work accordingly and recording quality judgment on a detailed quality control sheet. Such functions are clearly reserved to management personnel and are supervisory. *Powers Regulation Co. v. NLRB*, (CA 7) 61 LRRM 2124, enf. 149 NLRB No. 119, 57 LRRM 1436.

In addition to the above authority, the assistant foremen have the authority to discharge employees without consulting with other members of management, i.e., Scott's threat to discharge Washington for insubordination. Furthermore, assistant foremen have the authority to control the behavior of employees in their area and to discipline them if necessary. Such authority is clearly indicative of an employee in a supervisory capacity. *Posner, Inc.*, 145 NLRB 1190; *Universal Packaging Corp.*, 149 NLRB No. 31.

The similarity of the authority of the assistant foremen in the immediate case to that of the "leadmen" in *Matthews & Co. v. NLRB*, supra at 2072, 2073 is notable:

"On the basis of our analysis of the record, we are of the opinion that the Board's determination that such leadmen are in fact supervisors has both the necessary warrant in the record and a reasonable basis in law. Of controlling importance is the testimony that the leadmen assign work to the employees in their departments; transfer employees from job to job, as necessary in their sole opinion; pass on employee requests for time off; effectively recommend discipline; and oversee the other employees' work, as well as checking its quality. *NLRB v. Syracuse Stamping*

Co., 208 F. 2d 77, 79, 33 LRRM 2127 (2 Cir.); *Eastern Greyhound Lines v. NLRB*, 337 F. 2d 84, 57 LRRM 2241 (6 Cir.); *NLRB v. Southern Bleachery & Print Works*, 257 F. 2d 235, 239, 42 LRRM 2533 (4 Cir.), cert. denied, 359 U.S. 911, 43 LRRM 2576. In addition, the record discloses that the leadmen meet regularly with Factory Foreman Landis, occasionally with Plant Superintendent Morton, and on one occasion all four leadmen attended a training session in Pittsburgh, the Company Headquarters. Of further significance in this connection is the testimony that the leadmen are paid from eleven to forty cents an hour more than the regular employees in their departments, and that petitioner's officials represented that the leadmen were their supervisors and the regular employees so regarded them. *NLRB v. Schill Steel Products, Inc.*, 340 G. 2d 568, 571-572, 58 LRRM 2177 (5 Cir.). Finally to be noted is the fact that if the leadmen were not supervisors, Factory Foreman Landis would have to exercise detailed supervision over some thirty-seven employees in the departments involved in a variety of tasks and handling products at many stages of completion in the production process. The unlikelihood of that situation occurring was properly considered by the Board. *Vega, et al. v. NLRB*, 341 F. 2d 576, 577, 58 LRRM 2439 (1 Cir.); *NLRB v. Supreme Dyeing & Finishing Corp.*, 340 F. 2d 493, 494, 58 LRRM 2281 (1 Cir.); *NLRB v. Mt. Clemens Metal Products Co.*, 287 F. 2d 790, 491, 47 LRRM 2771 (6 Cir.), enforced as modified, 126 NLRB 1297, 1298, n. 4, 45 LRRM 1465.

In short, the record here clearly supports a finding that the four leadmen are clothed "with genuine power to perform a supervisory function" (*NLRB v. Leland-Gifford, supra*) and the Board properly classified them as supervisors within the meaning of Section 2(11)

of the Act. Thus we hold that the Board correctly excluded leadmen from the bargaining unit and that petitioner is responsible for their conduct in connection with the found Section 8(a)(1) violations to be

VI. CONCLUSION

On the basis of the entire record, it is respectfully submitted that the Regional Director erred in his decision and that the credible evidence overwhelmingly proves that assistant foremen Ivory Scott, Alonzo Massey, and George Morris are supervisors within the meaning of Section 2 (11) of the Act and should be excluded from the appropriate unit.

Respectfully submitted,
STONEMAN AND CHANDLER

Original signed by:

Jerome H. Somers

[Certificate of Service Omitted]

TELETYPE

JUNE 18, 1968

TIME: 3:00 P.M.

ALBERT J. HOBAN, REGIONAL DIRECTOR
NLRB, BOSTON, MASS.

RE: MAGNESIUM CASTING CO., 1-RC-9973. IT IS
HEREBY ORDERED THAT THE EMPLOYER'S RE-
QUEST FOR REVIEW OF THE REGIONAL DIREC-
TOR'S DECISION AND DIRECTION OF ELECTION
BE, AND IT HEREBY IS, DENIED AS IT RAISES NO
SUBSTANTIAL ISSUES WARRANTING REVIEW.
BY DIRECTION OF THE BOARD:

(s) HOWARD W. KLEEB, Deputy
Ex. Secy.
NLRB, Washington, D.C.

emh/lm

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7184.

MAGNESIUM CASTING Co.,
PLAINTIFF, APPELLEE,
v.

ALBERT J. HOBAN, REGIONAL DIRECTOR
OF THE FIRST REGION OF THE NATIONAL LABOR
RELATIONS BOARD, ET AL.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Arnold Ordman, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, and *Gary Green* and *Abigail Cooley Baskir*, Attorneys, on memorandum of appellants in support of their motion for summary reversal.

Louis Chandler, *Jerome H. Somers* and *Stoneman and Chandler* on memorandum of appellee in opposition thereto.

September 10, 1968

ALDRICH, *Chief Judge*. This is a motion by the National Labor Relations Board and others, defendants appellants, for summary reversal for "manifest error." First Circuit Rule 5, July 1, 1968. The facts which afford the basis of our decision¹ may be fairly stated.

In March 1968, a union² filed a petition for election among certain employees of Magnesium Casting Co., plaintiff appellee herein. The customary formal hearing was

¹ We do not pass upon all of the issues raised by the Board, and we do not consider certain additional facts sought to be alleged by the involved union, would-be intervenor. The petition to intervene is mooted.

² United Steelworkers of America, AFL-CIO.

conducted in April, and on May 22 the Regional Director ordered that an election be held on June 21. The plaintiff was directed to furnish a list of names and addresses of all eligible employees within seven days, pursuant to the so-called *Excelsior* rule. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236. Plaintiff furnished such a list on May 29.

On June 12, 1968, this court decided in *Wyman Gordon Co. v. NLRB*, F. 2d, that the *Excelsior* rule had been promulgated in violation of the Administrative Procedure Act, and held that noncompliance therewith could not form the basis of a subpoena or order against the employer. Relying on this decision the present plaintiff, on June 17 and thereafter, requested the Board to set aside its May 22 decision and order. The Board refused. The election was conducted as scheduled, and the union won. In the district court the plaintiff then sought a mandatory injunction setting aside the election as void. The defendants moved to dismiss, *inter alia* attacking the jurisdiction of the court, asserting that the case was not one of voidability within *Leedom v. Kyne*, 1958, 358 U.S. 184. The court did not pass on this motion, but entered an interlocutory injunction against the defendants, enjoining them from certifying the results of the election pending the outcome of certiorari proceedings in *Wyman Gordon*. Defendants appealed, and now bring the present motion.

OPINION OF THE COURT

We reverse. The court has substantially misconstrued the effect of *Wyman Gordon*. Plaintiff's recourse, if the *Excelsior* rule was invalid, was to refuse to comply and to allow the election to proceed in an otherwise orderly fashion if the Board and the union were so minded. Plaintiff could not use its own compliance, afterwards regretted, as a basis for stopping all proceedings.³ This is a clear case of waiver.

³ We do not pause to consider how, if plaintiff's position were to be upheld, the egg could be unscrambled.

There is no merit in the contention that the election was unlawful. The fact that the Board improperly ordered the plaintiff to supply certain factual information was not jurisdictional so far as the election itself was concerned, but merely collateral thereto. A matter far more jurisdictional was held to be waived in *United States v. L. A. Tucker Truck Lines, Inc.*, 1952, 344 U.S. 33, because not promptly asserted. It is true that plaintiff did not wait long in the case at bar as did Tucker, but the principle is the same. Plaintiff should have separated and resisted the illegal portion of the May 22 order rather than have complied therewith and then claimed that compliance tainted the rest.

Equally there is no merit in the claim made in plaintiff's brief in this court that the Board misrepresented its powers. There was no misrepresentation of fact in *Excelsior*. The facts were correctly set forth in the opinion. All that was involved was a question of law. That is no more a basis of misrepresentation than is the Board's claimed "threat" to take legal recourse actionable coercion. See *Commercial Credit Corp. v. Sorgel*, 5 Cir., 1960, 274 F. 2d 449, 453, cert. denied 390 U.S. 985.

Labor matters should proceed promptly. Plaintiff was no different from the employer in *Wyman Gordon*. Not being as alert to its rights, it missed the boat, or more exactly, boarded a boat it need not have. That is the end of it.

Plaintiff's motion for oral argument is denied. We have reviewed its brief, and consider the issue so plain that we would not be helped by oral argument. Due process does not require oral argument in every case, as is made apparent by the Supreme Court's summary reversal procedure on petition for certiorari.

The interlocutory order of the district court is vacated and that court is instructed to dismiss the complaint.

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election by the Regional Director, dated May 22, 1968, an election was conducted on June 21, 1968 among the employees in the unit found appropriate. The Tally of Ballots cast at said election is as follows:

Approximate number of eligible voters	205
Void ballots	0
Votes cast for Petitioner	140
Votes cast against participating labor organization	59
Valid votes counted	199
Challenged ballots	1
Valid votes counted plus challenged ballots	200

On June 28, 1968 the Employer filed timely Objections to Conduct Affecting the Results of the Election and served a copy thereof upon the Petitioner.

The Objections allege the following:

- “1. Following a formal hearing on the petition for representation filed by the United Steelworkers of America, AFL-CIO, hereinafter called ‘the Union’, Albert J. Hoban, Regional Director for the First Region issued a Decision and Direction of Election, dated May 22, 1968, in which the Employer was required to file within seven days with the Regional Director an election eligibility list containing the names and addresses of all eligible voters. The list was to be made available to all parties to the election. The Decision stated that ‘failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed,’ and cited *Excelsior Underwear, Inc.*, 156 NLRB 1236 as the authority which established this ‘rule’.

Complying with the requirements of the *Excelsior* rule under the threat of the election being set aside absent such compliance, the Employer provided the list to the Board on May 29, 1968.

On June 12, 1968, the United States Court of Appeals for the *First Circuit*, in *Wyman-Gordon Company et al v. National Labor Relations Board*, No. 7000, 68 LRRM 2483, ruled that the procedure followed in implementing the *Excelsior* rule did not properly conform to the notice and publication requirements of the Administrative Procedure Act, 5 U.S.C.A. Sections 552, 553. By promulgating the *Excelsior* 'rule' in the manner it did, the Board violated Congress instruction as to the procedures it must follow as a Government agency.

According to the *Wyman-Gordon* decision, the Board's *Excelsior* rule had the purpose of 'requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns'. *ibid.* at 2485. This 'affirmative assistance' to the Petitioner at the direction of the Board under a rule promulgated in contravention of the Administrative Procedure Act in furnishing the list of names and addresses to the Petitioner is, by its very nature, conduct which prejudicially affects the results of the election.

On June 17, 1968, the Employer filed with the Regional Director a Motion to Withdraw the Decision and Direction of Election and Dismiss Petition. On June 19, 1968, the Regional Director denied the Motion on the basis that the *Wyman-Gordon* decision, as he interpreted it, does not

have 'retroactive application.' Immediately thereafter, the Employer filed a request for special permission to appeal the Regional Director's action. The Board denied the request 'as lacking in merit.'

Since the decision in *Wyman-Gordon* struck down the *Excelsior* 'rule' because its promulgation contravened the Administrative Procedure Act, the rule must be invalid *ab initio*; therefore, the Court's decision must be retroactively effective.

Furthermore, it should be noted that failure to comply with the *Excelsior* requirements is explicitly held to be conduct to which a union may properly object and have the election set aside. The Employer respectfully urges that the converse of this situation — namely, compliance with an invalid rule necessitates that the election be set aside when proper objections are filed.

- "2. Prior to the election the Union, by its officers and agents, informed employees of the Employer that if they did not sign an authorization card for the Union and vote for the Union, they would have to pay \$75 initiation fees to the Union."

On July 30, 1968, the Employer, by its attorney, notified the undersigned that it had chosen to rely solely on the issue presented by Objection No. 1 and that it did not wish to proceed on Objection No. 2.¹

Pursuant to Section 102.69 of the Board's Rules and

¹The Employer took the same position in its Motion to Dismiss Steelworkers Motion to Dissolve Preliminary Injunction filed with the United States District Court for the District of Massachusetts on July 31, 1968.

Regulations, Series 8, as amended, the undersigned has conducted an investigation of the Objections. The investigation reveals the following:

OBJECTION NO. 1:

On June 12, 1968, following the issuance of the Decision and Direction of Election herein, the United States Court of Appeals for the First Circuit handed down its opinion in *Wyman-Gordon Company et al. v. N.L.R.B.*,² setting aside an order of the District Court enforcing compliance with a Board subpoena ordering *Wyman-Gordon Company* to furnish names and addresses of its employees in accordance with the rule announced by the Board in *Excelsior Underwear, Inc.*, 156 NLRB 1236. On June 17, 1968 the Employer in this case filed a Motion to Withdraw Decision and Direction of Election and Dismiss Petition, relying on *Wyman-Gordon* and setting forth substantially the same argument embodied in its Objection.

On June 19, 1968 I denied the Employer's motion on the ground that the decision of the First Circuit in *Wyman-Gordon* did not provide for retroactive application. On the same date, the Employer requested the Board for special permission to appeal my denial of its motion. On June 21, 1968, but before the election was held, the Board denied the Employer's Request for Special Permission to Appeal.

Following the election and the filing of its Objections, the Employer, on July 11, 1968, filed a Complaint in the United States District Court for the District of Massachusetts seeking to enjoin the Regional Director and the Board from certifying the Petitioner, and after hearing thereon, the District Court issued an Order³ enjoining the defendants from certifying the results of the election pending the out-

² No. 7000, ___ F. 2d ___ (1st Cir. 1968), 68 LRRM 2483.

³ *Magnesium Casting Co. v. Albert J. Hoban, Regional Director, National Labor Relations Board, et al.* No. 68-625-C, ___ F. Supp. ___ (D.C. Mass. 1968), 68 LRRM 2765.

come of an application to the United States Supreme Court for a writ of certiorari to the United States Court of Appeals for the First Circuit in *Wyman-Gordon*.⁴

On August 2, 1968, the Defendants appealed to the United States Court of Appeals for the First Circuit from the Order of the District Court enjoining the certification and on September 10, 1968 the Court of Appeals entered its Judgment⁵ reversing the action of the District Court.⁶ The Court of Appeals expressed itself as follows:

"... The Court [below] has substantially misconstrued the effect of *Wyman-Gordon*. Plaintiff's recourse, if the *Excelsior* rule was invalid, was to refuse to comply and to allow the election to proceed in an otherwise orderly fashion if the Board and the Union were so minded. Plaintiff could not use its own compliance, afterwards regretted, as a basis for stopping all proceedings. This is a clear case of waiver."

In light of the opinion of the United States Court of Appeals for the First Circuit, it is concluded that this Objection is without merit. Accordingly, since Objection No. 2 has been withdrawn, no merit attaches to any part of the Objections and they are overruled in their entirety.

CERTIFICATION OF REPRESENTATIVE

Pursuant to the authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that UNITED STEELWORKERS OF AMERICA, AFL-CIO has been designated and selected by a majority of the employees of the

⁴ The Board's application for a writ of certiorari was granted and the *Wyman-Gordon* case is on the docket of the Supreme Court for the 1968-69 term. (Docket No. 463).

⁵ *Magnesium Casting Co. v. Albert J. Hoban, Regional Director, National Labor Relations Board, et al.* No. 7184, ___ F. 2d ___ (1st Cir. 1968), 69 LRRM 2235.

⁶ On October 2, 1968 the District Court, in accordance with the Judgment of the Court of Appeals, entered its own Judgment vacating its Interlocutory Order and dismissing the Complaint.

above-named Employer, in the unit described below, as their representative for the purpose of collective bargaining, and that, pursuant to Section 9(a) of the Act, the said organization is the exclusive representative of all the employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

THE UNIT: "All production and maintenance employees of the Employer at its Hyde Park, Massachusetts plant, including the records keeping department employees, shipping and receiving employees, and the truck driver, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act."

Signed at Boston, Massachusetts, this 11th day of October, 1968.

On behalf of the
NATIONAL LABOR RELATIONS
BOARD

Original signed by:

ALBERT J. HOBAN

Director, Region 1

National Labor Relations Board

Boston, Massachusetts 02203

TELETYPE

OCT. 18, 1968

TIME: 4:50 P.M.

OGDEN FIELDS

NLRB, WASH., D.C.

REGARDING MAGNESIUM CASTING COMPANY
CASE NO 1-PC-9973 EMPLOYER EXCEPTS TO SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE ISSUED BY REGIONAL DIREC-

TOR ON OCTOBER 11 1968 FOR REASON THAT EMPLOYER WILL SEEK WRIT OF CERTIORARI BEFORE THE UNITED STATES SUPREME COURT. REGIONAL DIRECTORS DECISION IS BASED ON OPINION OF FIRST CIRCUIT COURT OF APPEALS 69 LRRM 2235 WHICH IS NOT COURT OF LAST RESORT. THEREFORE EMPLOYER REQUEST THAT CERTIFICATION BE HELD IN ABEYANCE PENDING DISPOSITION BY SUPREME COURT OF WRIT OF CERTIORARI. COPY SENT TO OTHER PARTIES. COPIES FOR BOARD WILL FOLLOW.

Magnesium Casting Co.
By its Attorneys
STONEMAN AND CHANDLER
JEROME H. SOMERS

NATIONAL LABOR RELATIONS BOARD

NLRB, 1st Region
Att: Albert Hoban
Boston, Mass.

Stoneman & Chandler
Att: Jerome H. Somers, Esq.
79 Milk Street
Boston, Mass.

Angoff, Goldman, Manning & Pyle
Att: E. David Wanger, Esq.
44 School Street
Boston, Mass.

RE: MAGNESIUM CASTING CO., 1-RC-9973. IT IS
HEREBY ORDERED THAT THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIREC-

TOR'S SUPPLEMENTAL DECISION AND CERTIFICATION OR REPRESENTATIVE BE, AND IT HEREBY IS, DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD.

Robert Volger

Associate Executive Secretary

Order Section	dab	5959	11/1/68	11:25 AM
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COMPLAINT AND NOTICE OF HEARING

It having been charged by United Steelworkers of America, AFL-CIO, 1486 Dorchester Avenue, Boston, Massachusetts (herein called the Union) that Magnesium Casting Co., 98 Business Street, Hyde Park, Massachusetts (herein called Respondent) has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (herein called the Act) the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1. The Charge in this proceeding was filed by the Union on October 23, 1968 and a copy thereof served upon Respondent on October 23, 1968.

2. Respondent is and has been at all times material hereto a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Massachusetts.

3. At all times herein mentioned, Respondent has maintained its principal office and place of business at 98 Business Street in the City of Boston, County of Suffolk, and Commonwealth of Massachusetts, (herein called the Hyde

Park plant), and is now and continuously has been engaged at said plant in the manufacture of die casting and related products.

4. Respondent in the course and conduct of its business causes, and continuously has caused at all times herein mentioned, large quantities of magnesium used by it in the manufacture of desk accessories to be purchased and transported in interstate commerce from and through various States of the United States other than the Commonwealth of Massachusetts, and causes, and continuously has caused at all times herein mentioned, substantial quantities of desk accessories to be sold and transported from said plant in interstate commerce to States of the United States other than the Commonwealth of Massachusetts.

The Respondent annually ships to and receives from States outside the Commonwealth of Massachusetts materials valued in excess of \$50,000.

5. The aforesaid Magnesium Casting Co. is and has been engaged in commerce within the meaning of the Act.

6. The Union is a labor organization within the meaning of Section 2(5) of the Act.

7. All production and maintenance employees of Respondent employed at its Hyde Park, Massachusetts plant, including the records keeping department employees, shipping and receiving employees, and the truck driver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

8. On or about June 21, 1968, a majority of the employees in the unit described in Paragraph 7, by a secret ballot election conducted under the supervision of the Regional Director for the First Region of the Board, designated or selected the Union as their representative for the purpose of collectible bargaining.

9. At all times material herein, the Union has been the representative for the purposes of collective bargaining of a majority of the employees in the said unit and, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in the said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

10. On or about October 22, 1968, the Union requested Respondent to bargain collectively in respect to rates of pay, wages, hours of employment or other conditions of employment with the Union as the exclusive representative of all the employees of Respondent in the unit described above in Paragraph 7.

11. On or about October 22, 1968, and at all times thereafter, Respondent did refuse and continues to refuse to bargain collectively with the Union as the exclusive representative of all the employees in the unit described above in Paragraph 7.

12. By the acts described above in Paragraph 11, Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

13. By the acts described above in Paragraph 11, and by each of said acts, Respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

14. The activities of Respondent, described above in Paragraph 11, occurring in connection with the operations of Respondent, described above in Paragraphs 3 and 4 have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

15. The acts of Respondent, described above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), and (5), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 25th day of November, 1968 at 10:00 o'clock in the forenoon, Eastern Standard Time, at Room 2007, John F. Kennedy Federal Building, Boston, Massachusetts, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

WHEREFORE, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the First Region, on this 8th day of November, 1968, issues this Complaint and Notice of Hearing against Magnesium Casting Co., Respondent herein.

Original signed by:

ALBERT J. HOBAN,

Regional Director

National Labor Relations Board

First Region

Boston, Massachusetts 02203

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS
HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN
UNFAIR LABOR PRACTICE CASES AS TAKEN FROM THE BOARD'S
PUBLISHED RULES AND REGULATIONS AND
STATEMENTS OF PROCEDURE

The hearing will be conducted by a Trial Examiner of the National Labor Relations Board. He will preside at the hearing as an independent, impartial trier of the facts and the law and his decision in due time will be served on the parties. His headquarters are either in Washington, D.C. or San Francisco, California.

At the date, hour, and place for which the hearing is set, the Trial Examiner, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clear-cut; or he may, on his own initiative, conduct such a conference. He will preside at any such conference, but he may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record — for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the Trial Examiner conducting the prehearing conference will be the one who will conduct the hearing; and *it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference.* No prejudice will result to any party unwilling to participate in or to make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Trial Examiner for his approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Trial Examiner specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Trial Examiner and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Trial Examiner will allow an automatic exception to all adverse rulings, and, upon appropriate order, an objection and exception will be permitted stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies shall also be supplied to other parties. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Trial Examiner, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Trial Examiner may himself ask for oral argument, if at the close of the hearing he believes that such argument would be beneficial to his understanding of the contentions of the parties and the factual issues involved.

Any party shall also be entitled upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the Trial Examiner who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations with respect to the procedure to be followed *before* the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Trial Examiner will be considered unless received by the Chief Trial Examiner in Washington, D.C. (or, in cases under the San Francisco, California branch office of Trial Examiners, the Associate Chief Trial Examiner in charge of such office) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously upon all other parties, and proof of such service furnished to the Chief Trial Examiner or Associate Chief Trial Examiner, as the case may be. All briefs or proposed findings filed with the Trial Examiner must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service upon the other parties.

In due course the Trial Examiner will prepare and file with the Board his decision in this proceeding, and will cause a copy thereof to be served upon each of the parties. Upon filing of the said decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, upon all parties. At that point, the Trial Examiner's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Trial Examiner's Decision, the submission of supporting briefs, requests for oral argument before the

Board, and related matters, is set forth in the Board's Rules and Regulations, Series 8, as amended, particularly in Section 192.46, and following sections. A summary of the more pertinent of these provisions will be served upon the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. Upon request, the Trial Examiner will afford reasonable opportunity during the hearing for discussions between the parties if adjustment appears possible, and may himself suggest it.

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FIRST REGION

Case No. 1-CA-6498

[Title Omitted]

ANSWER TO COMPLAINT

1. Respondent admits to the allegations in paragraphs one through six of the Complaint.
2. Respondent denies each and every allegation of paragraphs seven through fifteen of the Complaint as completely and specifically as if each were herein separately set forth and separately denied.
3. Respondent alleges that the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act should exclude assistant foremen in the Respondent's Products Division since such assistant foremen are supervisors within the meaning of Section 2(11) of the Act, and therefore the Union's representation petition should have been dismissed.
4. Respondent alleges that the showing of interest obtained by the Union was sufficiently tainted by the solicitation of authorization cards by supervisors so as to warrant

dismissal of the Union's representation petition in Case No. 1-RC-9973 and therefore revocation of the Regional Director's Certification of Representative.

5. Respondent alleges that the election of June 21, 1968 was not conducted according to rules promulgated in accordance with Section 6 of the Act, and therefore the results of the election cannot be the basis for a Certification of Representative and an obligation that Respondent engage in collective bargaining with the Union.

6. Respondent alleges that the election of June 21, 1968 was not conducted according to rules promulgated in accordance with the Administrative Procedure Act, 5 U.S.C.A. Secs. 552 and 553 and therefore the results of the election cannot be the basis for a Certification of Representative and an obligation that Respondent engage in collective bargaining with the Union.

7. Respondent alleges that this Complaint is brought without regard to Respondent's right to seek a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit in *Magnesium Casting Co. v. Albert J. Hoban, et al.*, No. 7184, upon which the Regional Director based his Supplemental Decision and Certification of Representative, issued October 11, 1968, which the Board affirmed by denying Respondent's request for review, said denial being issued November 1, 1968, and that this Complaint should be held in abeyance pending disposition by the Supreme Court of the United States of Respondent's petition for writ of certiorari.

Respectfully submitted,
MAGNESIUM CASTING CO.

* * *

(s) Louis Chandler

(s) Jerome H. Somers

Dated at Boston, Massachusetts on November 19, 1968

[NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS]

[Title Omitted]

ORDER TO SHOW CAUSE ON MOTION FOR
SUMMARY JUDGMENT

Counsel for the General Counsel having on December 5, 1968, filed a Motion for Summary Judgment dated December 3, 1968, all parties are directed to show cause before me in writing, if cause they have, on or before December 20, 1968, as to whether or not the Motion should be granted. Responses to the Order shall be accompanied by any briefs, proposed findings or other matter intended to be submitted for consideration, either in connection with disposition of the Motion or in connection with disposition of the case on the merits. If no response disclosing material unresolved issues litigable before and requiring hearing by a trial examiner is filed by December 20, 1968, the Motion for Summary Judgment may be granted forthwith.

Responses shall be directed to Charles W. Schneider, Trial Examiner, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570.

Ruling on the Respondent's Motion for Bill of Particulars filed November 19, 1968, is reserved pending disposition of the Motion for Summary Judgment.

Original signed by:

CHARLES W. SCHNEIDER
Trial Examiner

Dated: December 6, 1968, Washington, D.C.

[Title Omitted]

RESPONDENT'S REPLY TO SHOW CAUSE ORDER

I. *Omission of Facts By General Counsel.*

Comes now Magnesium Casting Co., Respondent herein,

and in reply to the Trial Examiner's Order to Show Cause first states that General Counsel has not fully disclosed the entire background of the case herein, since he has omitted two crucial documents having significant bearing on this case. First, General Counsel does not state the fact that the Employer's Motion to Withdraw Decision and Direction of Election and Dismiss Petition was denied by the Regional Director on the grounds that *Wyman-Gordon Company et al v. National Labor Relations Board*, 397 F.2d 394 (1968) did not have "retroactive application" (copy attached as Appendix A). Second, General Counsel neglects to assert that on request for review, the Board denied the request as "lacking in merit" (copy attached as Appendix B); at no time did the Regional Director or the Board rely on or assert a doctrine that the Respondent had waived its right to object to the *Excelsior* requirement by submitting the list.

Respondent Moves that the Motion for Summary Judgment be Denied for the Following Reasons:

II. *The Complaint Issued by General Counsel is Premature.*

The Regional Director's Supplemental Decision and Certification of Representative (Exhibit G attached to Motion for Summary Judgment), affirmed by the Board on November 1, 1968, is *not* based on a final decision of the federal courts since Respondent, on December 9, filed with the United States Supreme Court to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit Court (attached as Appendix C'), seeking to have the Supreme Court reverse the decision of the First Circuit in *Magnesium Casting Co. v. Albert J. Hoban, et al*, No. 7184, F.2d, which had reversed the decision of the United States District Court for the District of Massachusetts in *Magnesium Casting Co. v. Albert J. Hoban, et al*, Civil Action No. 68-625-C, F. Supp. Should the Board issue

a bargaining order prior to a decision of the Supreme Court it would require the Company to bargain while awaiting a decision of the Supreme Court which may well declare the election upon which the bargaining order is based to be invalid and, therefore, nullify any requirement to bargain. Practically speaking, such a posture may cause the Respondent irreparable harm and hopelessly disrupt employer-employee relations.

Furthermore, the duplication of effort which will result from this hearing is precisely what the Board seeks to avoid. Why does the General Counsel proceed to issue a complaint in which one of the defenses raised is one which the parties are presently litigating in the courts? Of what effect is a Board resolution of this dispute over conduct affecting the results of the election when in fact the Supreme Court has now agreed to review the validity of the *Excelsior* rule in the case of *Wyman-Gordon Company, et al v. National Labor Relations Board*, supra, and is considering Respondent's petition for certiorari, which has been docketed by the Court? Should the Trial Examiner and Board find for the General Counsel and enforcement efforts be made in the courts, are we not placed in a posture similar to that presently existing? The General Counsel, by attempting to go forward in this manner, is engaging in duplication of effort and harassment of the Respondent.

III. *General Counsel Should be Estopped From Seeking a Motion for Summary Judgment which Conflicts with Assurances by General Counsel, Conveyed by United States Senator Edward M. Kennedy, that Respondent is Entitled to a Full and Complete Hearing.*

General Counsel's Motion for Summary Judgment is in direct conflict with information provided to Respondent by Arnold Ordman, General Counsel of the Board, and by Edward M. Kennedy, United States Senator from the

Commonwealth of Massachusetts. On October 11, 1968, Kenneth Sullo, president of Respondent, wrote to Senator Edward M. Kennedy and inquired whether Respondent "will have an opportunity to present its evidence at a formal hearing" should the Board issue a complaint (letter attached as Appendix D).

On October 23, 1968, Senator Kennedy acknowledged Mr. Sullo's letter and stated he was referring it to the "appropriate authorities" (letter attached as Appendix E).

On October 30, 1968, Senator Kennedy wrote to Mr. Sullo enclosing a copy of a letter from Arnold Ordman, General Counsel, stating that a respondent "is entitled to participate fully and present whatever evidence it has in support of its position to a duly designated Trial Examiner" in a hearing and that such proceeding will be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure (attached as Appendixes F-1 and F-2).

General Counsel's Motion for Summary Judgment does not conform with his own statements in his letter to Senator Kennedy which the senator forwarded to Mr. Sullo. The granting of the Motion for Summary Judgment would clearly result in the deprivation of the right to participate fully in a hearing and present whatever evidence Respondent has in support of its position on all of the issues to a Trial Examiner, in accordance with the rules of evidence. Respondent urges that the misleading remarks of General Counsel in response to its president's inquiry made through the office of Senator Kennedy have prejudiced its posture in this case and General Counsel should be estopped from even seeking to obtain a Summary Judgment.

IV. *The Decision of the First Circuit Court of Appeals in Wyman-Gordon and the Imminent Decision of the United States Supreme Court in the Same Case Constitute Such Newly-Discovered Evidence as to Necessitate a Full and Complete Hearing.*

The decision of the United States Court of Appeals for the First Circuit in *Wyman-Gordon Company, et al v. National Labor Relations Board*, supra, declared the *Excelsior* rule to have been illegally promulgated and was issued following Respondent's submission of the *Excelsior* list to the Regional Director. It is respectfully submitted that this new decision, following Respondent's compliance with the requirements of *Excelsior*, together with the imminent decision of the Supreme Court of the United States on the writ of certiorari from the First Circuit Court's *Wyman-Gordon* decision, which was subsequently granted, constitute such newly-discovered evidence which, having a substantial effect upon the representation election and upon these proceedings, necessitates a full and complete hearing before a trial examiner and precludes a summary judgment. Furthermore, the necessity for holding this proceeding in abeyance pending the decision of the United States Supreme Court in *Wyman-Gordon*, and pending action on the Respondent's petition for writ of certiorari is readily discernible, since the resolution of the issue of waiver raised in Respondent's petition for certiorari may well resolve at least one issue, i.e., that concerning whether the *Wyman-Gordon* case constitutes newly-discovered evidence.

V. *The Representation Election of June 21, 1968 was Not Conducted According to Rules Promulgated in Accordance with Section 6 of the Act and Therefore is Invalid.*

Respondent submits that since the election of June 21, 1968, was not conducted pursuant to rules promulgated in accordance with Section 6 of the Act, the election must be voided and no certification can be based upon its results.

That the submission of the list of names and addresses assisted the union and gave them access to information not readily available cannot be disputed. And even if it is

disputed, it creates a factual issue upon which a hearing must be held in order to ascertain those facts necessary to make an informed decision. Any other effects resulting from Respondent's compliance with the illegally promulgated rule must also be aired in a hearing.

Furthermore, a respondent should have the opportunity to present evidence pertaining to its position that the denial of its right to notice and publication of a proposed ruling under the Administrative Procedure Act as required by Section 6 of the Act denied its rights to due process. The opportunity to present its position, as well as to have others present their positions, was denied Respondent when the Board followed its own improvised rule-making procedure in complete disregard of the explicit intent of Congress in Section 6 of the Act. Perhaps, if the proper procedure had been followed, a rule prohibiting unions to visit employees' homes would have been promulgated in order to balance the *Excelsior* requirement — or perhaps other ideas would have been presented so as to alter, amend, modify or supplement the *Excelsior* rule.

The General Counsel, by insisting on proceeding with this Complaint, again appears to show disregard of the intent of Congress. Should the Supreme Court in *Wyman-Gordon* find that the *Excelsior* rule was improperly promulgated there can be little doubt that Respondent in this action was prejudiced by being subjected to an election conducted under conditions imposed in a manner contrary to Congressional intent, and by being required to recognize and bargain with a Union which certification was based on that election. Certainly the "laboratory conditions" which are so overzealously sought to be preserved by the Board in conducting its elections have been violated and, therefore, the results of that election should not be the basis for any certification.

VI. *The Appropriate Unit Should Have Excluded as Supervisors the Assistant Foremen in the Products Division.*

Respondent submits that the unit appropriate for the purposes of collective bargaining should have excluded assistant foremen in the Products Division since they are supervisors within the meaning of Section 2(11) of the Act.

Respondent offers to prove through the presentation of evidence that:

(1) the Products Division has four separate operations, including metal finishing, electroplating, assembly and packaging, each of which is directed by an assistant foreman who is responsible to one of two foremen of the Division, who undisputedly are supervisors within the meaning of the Act;

(2) the assistant foremen attend and participate in management meetings to discuss and evaluate the performance of individual employees, analyze workloads, establish policy, discuss production problems, quality control and the hiring of additional employees;

(3) the assistant foremen possess and do exercise the independent authority to discharge, suspend or discipline employees;

(4) they have and do exercise the responsibility to direct employees in order to ensure the smooth flow of production, including among other duties, transferring employees, granting leaves of absence, determining products to be manufactured, assessing quality of production, and maintaining discipline;

(5) they receive considerably higher wage rates than non-supervisory employees;

(6) the assistant foremen have and do exercise the authority to recommend employees for wage increases.

Respondent submits that the testimony to be elicited at the hearing, together with that additional evidence pur-

posely withheld by witnesses presented by the Union in the prior representation hearing will support Respondent's position that the assistant foremen in the Products Division should be excluded from the appropriate unit, since they are supervisors within the meaning of the Act.

The possession of the above indicia of supervisory capacity is clearly sufficient to establish supervisory authority. Possession of any one of the authorities listed in Section 2(11) places the employee invested with that authority within the definition of supervisor. *Ohio Power Co. v. National Labor Relations Board*, 176 F.2d 385, 387 (6 Cir.) cert. denied 338 U.S. 899. The existence of the power determines the classification of the employee. See *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, (6 Cir.) cert. denied 335 U.S. 908; *NLRB v. Leland Gifford Co.*, 200 F.2d 620 (1 Cir.).

Attendance at periodic meetings of management personnel is a strong indication of supervisory authority. *Borden Co.*, 157 NLRB No. 93; *Watkins Furniture Co.*, 160 NLRB No. 20; *Heck's Inc.*, 156 NLRB No. 73. In addition, the directing of the work force, transferring of employees, checking of production quality, distribution and scheduling of work all reveal supervisory authority. *Regency Electronics, Inc.*, 169 NLRB No. 49; *Johnson Metal Products*, 161 NLRB No. 76.

A further indication of supervisory capacity is that the assistant foremen were held out to be supervisors when their authority was explained to employees over whom they had authority. *Kane Bag Supply Co.* 173 NLRB No. 180; *Harvey Aluminum (Inc.)*, 156 NLRB No. 115. Recommendation of pay increases also indicates supervisory position, *Home Exterminating Co.*, 160 NLRB No. 108, as does the authority to control the behavior of employees. *I. Posner, Inc.* 145 NLRB 1190.

The exclusion of the supervisors would affect not only

the makeup of the unit, but additionally the validity of the showing of interest in the representation proceedings.

VII. *Newly-Discovered Evidence Concerning the Supervisory Status of Ivory Scott and His Actions on Behalf of the Union Necessitate a Full and Complete Hearing in this Matter.*

Respondent submits that the showing of interest in the representation case was clearly tainted by solicitation on behalf of the union by a supervisor — Ivory Scott. Respondent offers to prove in a full hearing that Ivory Scott:

- (a) admittedly withheld information in the representation hearing concerning his full responsibilities and authority as an assistant foreman for Respondent;
- (b) had the authority to and often did independently exercise such authority to:
 - (1) direct mixing of chemical solutions;
 - (2) direct plating operations;
 - (3) keep quality control records based on his own judgment of an employee's performance;
 - (4) correct employees' work;
 - (5) warn employees concerning their conduct and production;
 - (6) discharge employees;
 - (7) participate with other members of management in meetings to discuss employees' job performance, personnel policy, production problems, hiring of additional employees;
 - (8) discipline employees;
 - (9) recommend wage increases for employees working under his direction; and
 - (10) transfer employees from one job to another;
- (c) was introduced to employees as having the responsibility for directing the electroplating room;
- (d) was asked by officers and/or agents of the Union,

the United Steelworkers of America, AFL-CIO, to solicit authorization cards from employees of Respondent;

(e) did, in fact, solicit authorization cards for the Union from Respondent's employees;

(f) did, in fact, purposely make it known among the employees of Respondent that he was actively soliciting authorization cards for the Union and that he was further participating in its organization drive; and

(g) did, in fact, give to the Union the numerous authorization cards which he obtained by his own solicitation, which cards were in turn submitted by the Union to the Regional Director in support of its representation petition.

Respondent submits the actions of Scott, a supervisor, in aiding the Union to obtain a sufficient showing of interest to support its petition for representation tainted said showing of interest so as to necessitate dismissal of the petition. That Scott acted as an agent of the Union is clear, not only from his having solicited for it, but also from its ratification of Scott's activities by using the cards to support its petition. See *International Woodworkers of America, AFL-CIO*, 13 NLRB 189.

In view of the substantive evidence which Respondent seeks to present, particularly the evidence that Scott admittedly withheld the full particulars of his responsibilities and authority and that he acted as an agent of the Union in soliciting cards, Respondent urges that it be given the opportunity to present such evidence at a full hearing.

VIII. *Conclusion and Motion to Postpone Hearing.*

For the reasons stated above Respondent urges that General Counsel's Motion for Summary Judgment be denied.

Furthermore, Respondent moves that the Trial Examiner postpone any hearing in the immediate case until such

time as the United States Supreme Court acts on its Petition for Writ of Certiorari and also renders its decision in the *Wyman-Gordon* case, since both cases will be decisive of some issues in this case and may well have a direct bearing upon the conduct of all parties to this hearing.

Respectfully submitted,
MAGNESIUM CASTING Co.
by its attorneys
STONEMAN AND CHANDLER
Original signed by:
LOUIS CHANDLER
Original signed by:
JEROME H. SOMERS

Dated at Boston, Massachusetts

December 31, 1968

Post Office Address

79 Milk Street

Boston, Massachusetts 02109

[Certificate of Service Omitted]

[THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.]

[Title Omitted]

TRIAL EXAMINER'S DECISION

Statement of the Case

The Representation Proceeding¹

Upon a petition filed under Section 9(c) of the National Labor Relations Act (29 U.S.C.A. 159(c)) by United Steelworkers of America, AFL-CIO, hereinafter called the Charging Party, a hearing was held by the Regional Direc-

¹ Administrative or official notice is taken of the record in the representation proceeding Case No. 1-RC19973, as the term "record" is defined in Section 102.68 and 102.69 (f) of the Board's Rules and Regulations Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB No. 81 enfd. 388 F. 2d 683 (C.A. 4, 1968).

tor for Region 1 of the Board at which the employer appeared specially arguing that the hearing should not be conducted because of the pendency of a charge filed by it against the Union alleging a violation of Section 8(b)(1) (A). The Motion was denied and the hearing was completed.

The Regional Director consequently issued a decision directing an election in a unit consisting of all production and maintenance employees of the employer at its Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act. The Decision specifically dealt with a classification of alleged supervisors known as assistant foremen, six of whom were found to be employees and the seventh to be a supervisor and excluded from the unit.

On May 31, 1968, the Respondent filed a request for review pursuant to Section 102.67 of the Board's Rules and Regulations contending that three of the assistant foremen found to be employees are in fact supervisors and the Union filed its statement in opposition to the request for review. On June 18 the Board denied the request for review on the ground that it raised no substantial issues warranting review. On June 17 Respondent filed a Motion to Withdraw Decision and Direction of Election and Dismiss Petition contending that by furnishing an election eligibility list to the Union pursuant to the *Excelsior* rule,² Respondent had been required to lend assistance to the Union which necessarily would affect the results of the election. Respondent also contended that the rule was improperly promulgated and contrary to the requirements of the Administrative Procedure Act.

The Motion was denied on June 19 by the Regional Direc-

² *Excelsior Underwear, Inc.*, 156 NLRB 1236.

tor on the ground that the *Wyman-Gordon*³ decision of the First Circuit upon which Respondent rested its Motion does not provide for retroactive application. The election was conducted on June 21, 1968, and Respondents moved the District Court for the District of Massachusetts for a ruling enjoining the certification of the results of the election on the same grounds on which its motion to the Regional Director rested. The United States District Court granted the rule sought by Respondent and its action was summarily reversed by the United States Court of Appeals for the First Circuit.⁴

On June 28 the Respondent filed objections to conduct affecting the results of the election, again raising the "*Ex-celsior*" and the "*Wyman-Gordon*" issues and further alleging that prior to the election the Union informed employees that if they did not sign an authorization card they would have to pay \$75 initiation fee to the Union. The objections were overruled and the United Steelworkers of America was certified as the representative of the employees on October 11, 1968. Respondent by telegram to the Board excepted to the Supplemental Decision and Certification on the ground that the employer proposed to seek a writ of certiorari before the United States Supreme Court to the decision of the First Circuit Court of Appeals in which the District Court injunction was set aside. This exception was treated as a request for review and denied on the ground that it raised no substantial issues warranting review.

The Complaint Case

On October 22, 1968, the Union filed the unfair labor practice charge involved in the instant case, alleging that the employer refused to bargain with the Union as the exclusive collective-bargaining representative of Respond-

³ *Wyman-Gordon Company et al. v. N.L.R.B.*, 379 F.2d 394 (1968).

⁴ 69 LRRM 2235.

ent's employees in spite of the certification. On November 8, 1968, the Regional Director for Region 1 issued a Complaint and Notice of Hearing alleging that Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to bargain with the Union upon request. On November 18 Respondent filed a Motion for a Bill of Particulars and on the 19th an Answer to the Complaint. The General Counsel filed an Opposition to the Motion for a Bill of Particulars giving certain additional particulars. On December 5 a Motion for Summary Judgment dated December 3 was filed with the Chief Trial Examiner by the Regional Director. Trial Examiner Schneider on December 6 issued an Order to Show Cause on the Motion for Summary Judgment to which Respondent replied on January 2, 1969.

Ruling on Motion for Summary Judgment

In its Opposition to the Motion for Summary Judgment the Respondent urges that the General Counsel's Motion should be denied for a number of reasons which may be summarized as follows:

1. The General Counsel omitted part of the background of the case notably the grounds on which the Regional Director denied the employer's Motion to Withdraw Decision and Direction of Election and Dismiss the Petition.
2. The complaint is premature since the Respondent has filed a Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit in its injunction proceeding and further the Supreme Court has agreed to review the *Wyman-Gordon* Decision wherefore the Board should not proceed with this matter until both actions by the Supreme Court have been consummated.
3. The General Counsel should be estopped from its

motion by the action of the General Counsel in granting certain assurances to Respondent that it is entitled to a full hearing.

4. The Decision of the First Circuit Court of Appeals in *Wyman-Gordon* constitutes newly-discovered evidence.
5. The representation election was not conducted according to rules promulgated in accordance with *Section 6* of the Act and is therefore invalid.
6. The appropriate unit should have included as supervisors the assistant foremen.
7. Newly-discovered evidence concerning the supervisory status of one Scott and his actions on behalf of the Union necessitate a full hearing.

Finally Respondent moved that the Trial Examiner postpone the hearing in the instant case until the Supreme Court acts on the petition for writ of certiorari and also renders its decision in the *Wyman-Gordon* case.

With respect to the first issue raised by Respondent concerning the omission of facts by the General Counsel, as I stated above, administrative notice has been taken of the record in the representation proceeding which includes the employer's Motion to Withdraw the Decision and Direction of Election, the denial by the Regional Director, the Request for Review and the Board's denial thereof. Accordingly, the facts allegedly omitted by the General Counsel are before the Trial Examiner and the Board.

With regard to Respondent's argument that the complaint issued by the General Counsel is premature, to the extent that Respondent's argument is predicated on the litigation of the validity of the *Excelsior* rule in the *Wyman-Gordon* case this matter has already been considered by the Board in the representation proceeding and will not be reconsidered herein. To the extent that the argument

is predicated on the filing of a petition for certiorari in the injunction proceeding Respondent cites no authority for the proposition that the Board's processes should be held up pending a determination by the Supreme Court of the United States whether to grant certiorari and presumably if certiorari is granted the period of time necessary for the Supreme Court to issue its decision. As the United States Court of Appeals for the First Circuit stated in its decision in *Magnesium Casting Co.*, F. 2d (September 10, 1968) "labor matters should proceed promptly." I am not convinced by Respondent's argument especially in view of the fact that Respondent's petition for a writ of certiorari does not necessarily speak to the validity of the election.

Regarding Respondent's argument that the General Counsel should be estopped by alleged assurances by General Counsel Ordman that Respondent is entitled to a full and complete hearing, the alleged assurances are contained in a letter which recites the provisions of Section 10(b) of the National Labor Relations Act that any person charged with the commission of an unfair labor practice must be served with a complaint stating the charges and a notice of hearing. The notice of hearing sets the time and place of the hearing and advises a Respondent that it is entitled to participate fully and present whatever evidence it has in support of its position to a duly designated trial examiner.

The General Counsel's letter goes on to state "the Act also provides that such proceedings 'shall so far as practicable be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States. . . .'" The Board and the courts have many times had occasion to consider whether the language quoted above constitutes a requirement that a hearing be conducted in cases such as this. A recent case in which this issue was raised is *El-Ge Potato Chip Company, Inc.*, 173 NLRB

No. 19 in which the Trial Examiner quoted from the Board decision in *Harry T. Campbell Sons' Corporation*, 164 NLRB No. 36 fn.9 "where there are no unresolved issues requiring an evidential hearing the motion of the General Counsel for summary judgment on the pleadings is normally granted. There is no absolute right to a hearing." The United States Court of Appeals for the Fifth Circuit put it succinctly in *N.L.R.B. v. Air Control Window Products of St. Petersburg*, 335 F. 2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality."

The letter of the General Counsel does not constitute a waiver but on the contrary it refers to language which the Board and the courts have so many times construed that the construction must be read together with language. I reject the argument.

Respondent contends that the decision of the court in the *Wyman-Gordon* case and the "imminent decision of the United States Supreme Court in the same case" constitutes newly discovered evidence. Respondent does not indicate in what regard it considers that the decisions of courts constitute evidence nor, other than asserting the fact, do they argue so. However whether viewed as evidence or legal authority the contention was raised before the Board in the representation proceeding and rejected. The same must be said of Respondent's contention that the representation election was not conducted according to rules promulgated in accordance with Section 6 of the Act and is invalid. Respondent's reference therein is to the fact that the *Wyman-Gordon* decision found the "*Excelsior*" rule invalid because it was not published as a rule but laid down in a decision. Equally the contention that the appropriate unit should have excluded the assistant foreman was litigated before the Board in the representation proceeding. In the absence of newly discovered or previously unavail-

able evidence or special circumstances it is established Board policy not to permit litigation before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior representation proceeding.⁵ Respondent does not assert that any special circumstances exist other than its characterization of the decisional authorities in the *Wyman-Gordon* case as evidence and a contention that there is newly discovered evidence concerning the supervisory status of Ivory Scott, one of the assistant foremen.

In its Reply Respondent submits that Ivory Scott "admittedly withheld information in the representation hearing concerning his full responsibilities and authority as an assistant foreman for Respondent and that Scott solicited authorization cards for the Union and participated in its organizational drive." The only construction that I can make of Respondent's Reply is that it views Scott's "admission" as newly discovered evidence, however Respondent furnishes no support for its contention other than offering to prove in a full hearing that Scott had supervisory authority and did various acts consistent thereto, each of which particulars was litigated and considered in the hearing in the representation case. To what extent such evidence is new is impossible to determine other than Scott's admission which presumably came after the hearing and of which we know nothing. The evidence which Respondent offers to adduce is evidence which Respondent must have had prior to the representation case hearing. With regard to the fact that Scott solicited authorization cards and participated in the Union's organizational drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact. New evidence on an irrele-

⁵ *Howard Johnson Company*, 164 NLRB No. 121; *Winfield Manufacturing Co., Inc.*, 173 NLRB No. 103; *El-Ge Potato Chip Company, Inc.*, *supra*, and all the cases therein cited on this point.

vant issue is certainly not grounds for a hearing. The issue as to the inclusion of the assistant supervisors was vigorously contested at the representation hearing. No reason is given for failure to offer evidence such as Respondent recites at that time, if in fact it was not offered. There is no showing that the testimony was not then available or that it could not have been obtained and adduced with the exercise of reasonable diligence. Under these circumstances reopening the representation hearing at this stage of the proceeding is not warranted.⁶ I find the Respondent's contention unsubstantiated.

Finally Respondent moves to postpone the hearing until the decision of the Supreme Court on its petition for writ of certiorari. Inasmuch as I have found that no hearing is necessitated herein the Motion must be denied.

There being no unresolved issues requiring an evidential hearing the Motion of the General Counsel for Summary Judgment is granted and I hereby make the following:

Findings and Conclusions

I. Jurisdiction and Labor Organization

It is admitted in the answer and therefore found (1) that the Respondent is engaged in commerce within the meaning of 2(6) and (7) of the Act and (2) that the Union is a labor organization within the meaning of the Act.

II. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The Unit

The following employees at the Respondent's Hyde Park, Massachusetts plant constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

⁶ *Goldspot Dairy, Inc.*, 173 NLRB No. 151, Cf., *Ideal Laundry and Dry Cleaning Co.*, 330 F. 2d 712 (C.A. 10, 1964) therein cited.

All production and maintenance employees employed at Respondent's Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

2. The Certification

On June 21, 1968, the majority of the employees in the unit described above by a secret ballot election conducted under the supervision of the Regional Director for the First Region of the Board designated the Union as the representative for the purpose of collective bargaining with Respondent, and on October 11, 1968, the Regional Director for the First Region certified the Union as the collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

B. *The Request to Bargain and the Respondent's Refusal*

On or about October 22, 1968, the Union requested Respondent to bargain collectively in respect to rates of pay, wages, hours of employment or other conditions of employment with the Union as the exclusive representative of all the employees of Respondent in the unit described above.⁷

At all times since on or about October 22, 1968, the Respondent has refused to recognize and bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.

Accordingly I find that Respondent has refused to bargain collectively with the Union as the exclusive bargaining

⁷ Although Respondent in its answer denied that the Union requested Respondent to bargain it has at no point in the proceeding controverted this fact and its answer and particularly its Reply to the Order to Show Cause make it ultimately clear that it has and continues to refuse to bargain.

representative of the employees in the appropriate unit and that by such refusal the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

III. The Effect of the Unfair Practices Upon Commerce

The acts of the Respondent as set forth in Section II above occurring in connection with its operations as found in Section I above have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act I shall recommend that it cease and desist therefrom and upon request bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and if an understanding is reached embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their collective-bargaining agent for the period provided by law I shall recommend that the initial year of certification be construed as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Pacific Intermountain Express Company*, 173 NLRB No. 75; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 enfd. 328 F. 2d 600 (C.A. 5) cert. denied 379 U.S. 817.

Conclusions of Law

1. Magnesium Casting Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of Magnesium Casting Co. employed at its Hyde Park, Massachusetts plant including the record keeping department employees, shipping and receiving employees, and the truck-driver exclusive of its office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 22, 1968, the above-named labor organization has been certified as the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 22 and at all times since to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain Respondent has interfered with, restrained, and coerced and is interfering with, restraining and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Magnesium Casting Co., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargaining collectively concerning wages, hours and other terms and conditions of employment with United Steelworkers of America, AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate units.

All production and maintenance employees employed at Respondent's Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Upon request bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, hours and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its Hyde Park, Massachusetts place of business copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representatives shall be posted by Respondent immediately upon receipt thereof and be maintained by it for

⁸ In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

60 consecutive days thereafter including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify said Regional Director for Region 1 in writing within 20 days from receipt of this Recommended Order what steps the Respondent has taken to comply therewith.⁹

Dated at Washington, D. C. January 28, 1969

(s) PAUL E. WEIL,
Trial Examiner

⁹ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 1, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER
OF THE NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with UNITED STEELWORKERS OF AMERICA, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon request bargain with the above-named union as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

The bargaining unit is:

All production and maintenance employees employed at our Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees,

guards and all supervisors as defined in Section 2(11) of the Act.

MAGNESIUM CASTING CO.
(Employer)

Dated..... By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, John F. Kennedy Federal Bldg., 20th Floor, Cambridge & New Sudbury Streets, Boston, Mass. 02203 (Tel. No. 617-223-3300).

[NATIONAL LABOR RELATIONS BOARD]

[Title Omitted]

EXCEPTIONS TO TRIAL EXAMINER'S DECISION

Now comes the Respondent and excepts to the following statements, findings, ruling and conclusions of the Trial Examiner (full discussion of the issues raised herein is found in the brief):

1. To the statement on page 2, lines 24 through 30:

"The Motion was denied on June 19 by the Regional Director on the ground that the *Wyman-Gordon*³ decision of the First Circuit upon which Respondent rested its Motion does not provide for retroactive application. The election was conducted on June 21, 1968, and Respondent moved the District Court for the District of Massachusetts for a ruling enjoining the certification of the results of the election on the same grounds on which its motion to the Regional Director rested." for the reason that it is incomplete.

³ *Wyman Gordon Company et al v. N.L.R.B.*, 379 F. 2d 394 (1968).

2. To the ruling on page 4, lines 9 through 13:

“With regard to Respondent’s argument that the complaint issued by the General Counsel is premature, to the extent that Respondent’s argument is predicated on the litigation of the validity of the *Excelsior* rule in the *Wyman-Gordon* case this matter has already been considered by the Board in the representation proceeding and will not be reconsidered herein.”

for the reason that this matter directly affects the legality of the position of the United Steelworkers of America, AFL-CIO as the alleged exclusive collective bargaining representative of the alleged appropriate unit, and is not a matter strictly limited to the representation proceeding.

3. To the statement and finding on page 5 lines 41 through 52:

“The Board and the courts have many times had occasion to consider whether the language quoted above constitutes a requirement that a hearing be conducted in cases such as this. A recent case in which issue was raised is *El-Ge Potato Chip Company, Inc.*, 173 NLRB No. 19 in which the Trial Examiner quoted from the Board decision in *Harry T. Campbell Sons’ Corporation*, 164 NLRB No. 36 fn. 9 ‘where there are no unresolved issues requiring an evidential hearing the motion of the General Counsel for summary judgment on the pleadings is normally granted. There is no absolute right to a hearing.’ The United States Court of Appeals for the Fifth Circuit put it succinctly in *N.L.R.B. v. Air Control Window Products of St. Petersburg*, 335 F. 2d 245, 249 (C.A. 5, 1964): ‘If there is nothing to hear, then

a hearing is a senseless and useless formality.' ”
for the reason that they are irrelevant, easily distinguished from the facts in the present case and distort the facts in the present case.

4. To the finding on page 5, lines 1 through 4:

“The letter of the General Counsel does not constitute a waiver but on the contrary it refers to language which the Board and the courts have so many times construed that the construction must be read together with language. I reject the argument.”

for the reason that it is unsupported by the evidence on the record.

5. To the statement on page 5, lines 6 through 12:

“Respondent contends that the decision of the court in the *Wyman-Gordon* case and the ‘imminent decision of the United States Supreme Court in the same case’ constitutes newly discovered evidence. Respondent does not indicate in what regard it considers that the decisions of courts constitute evidence nor, other than asserting the fact, do they argue so. However whether viewed as evidence or legal authority the contention was raised before the Board in the representation proceeding and was rejected.”

for the reason that it is contrary to law and fact.

6. To the statement on page 5, lines 12 through 17:

“The same must be said of Respondent’s contention that the representation election was not conducted according to rules promulgated in accordance with Section 6 of the Act and is invalid. Respondent’s reference therein is to the fact that the *Wyman-Gordon* decision found the ‘*Excelsior*’

rule invalid because it was not published as a rule but laid down in a decision."

for the reason that it is contrary to law.

7. To the statement on page 5, lines 17 through 19:

"Equally the contention that the appropriate unit should have excluded the assistant foreman was litigated before the Board in the representation proceeding."

for the reason that it is submitted that newly discovered evidence or special circumstances have arisen necessitating a full hearing on such issues.

8. To the statement on page 5, lines 19 through 27:

"In the absence of newly discovered or previously unavailable evidence or special circumstances it is established Board policy not to permit litigation before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior representation proceeding.⁵ Respondent does not assert that any special circumstances exist other than its characterization of the decisional authorities in the *Wyman-Gordon* case as evidence and a contention that there is newly discovered evidence concerning the supervisory status of Ivory Scott, one of the assistant foremen."

⁵ *Howard Johnson Company*, 164 NLRB No. 121; *Winfield Manufacturing Co., Inc.*, 173 NLRB No. 103; *El-Ge Potato Chip Company, Inc.*, *supra*, and all the cases therein cited on this point.

for the reason that the decision in *Wyman-Gordon Company et al v. NLRB*, 379 F. 2d 394 (1968) and the prospective decision of the Supreme Court of the United States on the Writ of Certiorari from that case, and the admission after the hearing by Supervisor Scott constitute such special circumstances and newly

discovered evidence as to necessitate a full hearing before a trial examiner of the issues raised and outlined in the Respondent's Reply to the Show Cause Order.

9. To the statement on page 5, lines 33 through 38:

"The only construction that I can make of Respondent's Reply is that it views Scott's 'admission' as newly discovered evidence, however, Respondent furnished no support for its contention other than offering to prove in a full hearing that Scott had supervisory authority and did various acts consistent thereto, each of which particulars was litigated and considered in the hearing in the representation case."

for the reason that it is unsupported by the evidence on the record.

10. To the statement on page 5, lines 38 through 42:

"To what extent such evidence is new is impossible to determine other than Scott's admission which presumably came after the hearing and of which we know nothing. The evidence which Respondent offers to adduce is evidence which Respondent must have had prior to the representation case hearing."

for the reason that it is contradictory, mere conjecture and prejudicial to Respondent's rights of due process.

11. To the statement on page 5, lines 42 through 45:

"With regard to the fact that Scott solicited authorization cards and participated in the Union's organizational drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact."

for the reason that it is irrelevant and unsupported by the facts since newly discovered evidence and special circumstances reveal those facts to be inaccurate and false.

12. To the statement on page 5, lines 47 through 50:

“No reason is given for failure to offer evidence such as Respondent recites at that time, if in fact it was not offered. There is no showing that the testimony was not then available or that it could not have been obtained and adduced with the exercise of reasonable diligence.”

for the reason that it is contrary to the facts alleged in the Reply to the Show Cause Order and to the facts which Respondent offers to develop further in a full hearing before a Trial Examiner.

13. To the statement on page 5, lines 50 through page 6, line 3:

“Under these circumstances reopening the representation hearing at this state of the proceeding is not warranted.⁶ I find the Respondent’s contention unsubstantiated.”

⁶ *Goldspot Dairy, Inc.*, 173 NLRB No. 151 Cf., *Ideal Laundry and Dry Cleaning Co.*, 330 F. 2d 712 (C.A. 10, 1964) therein cited.

for the reason that it is error in law and in fact.

14. To the finding on page 6, lines 25 through 36:

“ 1. The Unit

The following employees at the Respondent’s Hyde Park, Massachusetts plant constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed at Respondent's Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act."

for the reason that it is unsupported in both law and fact and that the assistant foremen in the Products Division should be excluded from the unit appropriate for collective bargaining.

15. To the finding on page 6, lines 38 through 46:

"

2. The Certification

On June 21, 1968, the majority of the employees in the unit described above by a secret ballot election conducted under the supervision of the Regional Director for the First Region of the Board designated the Union as the representative for the purpose of collective bargaining with Respondent, and on October 11, 1968, the Regional Director for the First Region certified the Union as the collective-bargaining representative of the employees in said unit and the Union continues to be such representative."

for the reason that said election was conducted in violation of Section 6 of the Act and was, therefore, void.

16. To the finding on page 6, lines 49 through page 7, line 3:

"

B. *The Request to Bargain and the Respondent's Refusal*

On or about October 22, 1968, the Union re-

requested Respondent to bargain collectively in respect to rates of pay, wages, hours of employment or other conditions of employment with the Union as the exclusive representative of all the employees of Respondent in the unit described above.⁷

⁷ Although Respondent in its answer denied that the Union requested Respondent to bargain it has at no point in the proceeding controverted this fact and its answer and particularly its Reply to the Order to Show Cause make it ultimately clear that it has and continues to refuse to bargain.

for the reason that it is unsupported in both law and fact.

17. To the finding on page 7, lines 5 through 7:

“At all times since on or about October 22, 1968, the Respondent has refused to recognize and bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.”

for the reason that it is unsupported in both law and fact.

18. To the finding on page 7, lines 9 through 13:

“Accordingly I find that Respondent has refused to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit and that by such refusal the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

for the reason that it is unsupported in both law and fact.

19. To the finding on page 7, lines 15 through 22:

“ III. The Effect of the Unfair Practices
Upon Commerce

The acts of the Respondent as set forth in Section II above occurring in connection with its operations as found in Section I above have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."

for the reason that it is unsupported in both law and fact.

20. To the remedy on page 7, lines 24 through 40:

" The Remedy'

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act I shall recommend that it cease and desist therefrom and upon request bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and if an understanding is reached embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their collective-bargaining agent for the period provided by law I shall recommend that the initial year of certification be construed as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Pacific Intermountain Express Company*, 173 NLRB No. 75; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 enfd. 328 F. 2d 600 (C.A. 5) cert. denied 379 U.S. 817.

for the reason that it is not justified by the law or the facts.

21. To the conclusion on page 8, lines 1 through 7:
 "3. All production and maintenance employees of Magnesium Casting Co. employed at its Hyde Park, Massachusetts plant including the record keeping department employees, shipping and receiving employees, and the truckdriver exclusive of its office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act."

for the reason that it is unsupported in both law and fact and that assistant foremen in the Products Division should be excluded from the unit appropriate for collective bargaining.

22. To the conclusion on page 8, lines 9 through 12:
 "4. Since October 22, 1968, the above-named labor organization has been certified as the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act."

for the reason that such certification was an error in law and in fact.

23. To the conclusion on page 8, lines 14 through 18:
 "5. By refusing on or about October 22 and at all times since to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act."

for the reason that it is unsupported in both law and fact.

24. To the conclusion on page 8, lines 20 through 24:

“6. By the aforesaid refusal to bargain Respondent has interfered with, restrained, and coerced and is interfering with, restraining and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.”

for the reason that it is unsupported in both law and fact.

25. To the conclusion on page 8, lines 25 through 27:

“7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.”

for the reason that it is unsupported in both law and fact.

26. To the recommended order on page 8, line 29 through page 9, lines 16:

“ **RECOMMENDED ORDER**

Magnesium Casting Co., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours and other terms and conditions of employment with United Steelworkers of America, AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate units.

All production and maintenance employees employed at Respondent's Hyde Park, Massachu-

setts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Upon request bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, hours and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its Hyde Park, Massachusetts place of business copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representatives shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said no-

⁸ In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

tices are not altered, defaced or covered by any other material.

(c) Notify said Regional Director for Region 1 in writing with 20 days from receipt of this Recommended Order what steps the Respondent has taken to comply therewith.⁹

⁹ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 1, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

for the reason that such order and notice are unwarranted by the facts and by the law.

For all of the above considerations which shall be further discussed in its brief in support of these Exceptions to the Trial Examiner's Decision, Respondent urges that the Complaint in its entirety be dismissed or in the alternative that the Board reverse the Trial Examiner's Decision and remand the case to a new trial examiner for a full hearing as requested on the issues raised in Respondent's Reply to Show Cause Order.

Respectfully submitted,
MAGNESIUM CASTING COMPANY
By its attorneys
STONEMAN AND CHANDLER
(s) LOUIS CHANDLER
(s) JEROME H. SOMERS

Dated at Boston, Massachusetts
February 28, 1969

Post Office Address:
79 Milk Street
Boston, Massachusetts 02109

[CERTIFICATE OF SERVICE OMITTED]

[NATIONAL LABOR RELATIONS BOARD]

[Title Omitted]

DECISION AND ORDER

On January 28, 1969, Trial Examiner Paul E. Weil issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the Charging Party filed exceptions to the Trial Examiner's Decision and Respondent filed a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations¹ of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the

¹ In its exceptions to the Trial Examiner's Decision, the Charging Party requests an affirmative bargaining order, without any further request that the Respondent bargain with it, and a monetary remedy to, *inter alia*, make the employees and it whole for losses they may have suffered as a result of the Respondent's unlawful refusal to bargain. We deem it inappropriate in this case to depart from our existing policy with respect to remedial orders in cases involving violations of Section 8(a)(5), and therefore deny the said request. See *Monroe Auto Equipment Company*, 164 NLRB No. 144, footnote 1.

Trial Examiner, and hereby orders that the Respondent, Magnesium Casting Company, Hyde Park, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. April 17, 1969.

FRANK W. McCULLOCH,	<i>Chairman</i>
JOHN H. FANNING,	<i>Member</i>
SAM ZAGORIA,	<i>Member</i>
NATIONAL LABOR RELATIONS BOARD	

[SEAL]

[NATIONAL LABOR RELATIONS BOARD]

[Title Omitted]

MOTION FOR RECONSIDERATION

Comes now Magnesium Casting Co., Respondent in the above-entitled matter, and pursuant to Section 102.48(d) of the Board's Rules and Regulations moves the Board reconsider its Decision and Order, dated April 17, 1969, for the reason that the Board denied, on June 18, 1968, the Employer's Request for Review, dated May 31, 1968, subsequent to the representation hearing on the ground that it raised "no substantial issues warranting review" (see Ex. B and C. attached to Motion for Summary Judgment.) and later granted General Counsel's Motion for Summary Judgment in the above-entitled case, such conduct by the Board being in violation of Section 29 U.S.C. Sec. 160(c), wherein Congress stated that the Board must rule whether a litigant has committed an unfair labor practice. Respondent urges that the Board's failure to review the record before the Regional Director in order to make its own decision as to whether the Regional Director's decision was right violates the Act, as held in *Pepsi-Cola Buffalo Btlg. Co. v. NLRB*, (USCA 2, 1967) 70 LRRM 3185, a case decided on

March 25, 1969, following submission of Brief in the immediate case.

Crucial to the merits of the unfair labor practice case is the determination of the supervisory capacity of employee Ivory Scott, called an assistant foreman, who actively solicited authorization cards, as an agent for the union, and submitted these cards to support the union's showing of interest in its petition for a representation election, the results of which form the basis for the union's claim to be the employees' duly chosen exclusive collective bargaining agent. Furthermore, Scott actively campaigned and solicited votes for the union as an agent of the union, behavior which violates Section 8(b)(1)(A) of the Act. The total behavior of Scott, Respondent asserts, required the Regional Director to dismiss the petition since the showing of interest was tainted and the activity of Scott constituted an unfair labor practice, as alleged by Respondent in its charge in Case No. 1-CB-1362.

Following the filing by the union of a petition for representation, a hearing was held at which time the supervisory authority of a number of employees, including Ivory Scott, was contested. Simultaneously a charge filed by Respondent was pending in Case No. 1-CB-1362, alleging the union violated 8(b)(1)(A) by having Scott act as its agent in soliciting authorization cards, used to support the union's petition, and engaging in other conduct in support of the union tending to restrain and coerce employees in the exercise of their Section 7 rights. On the basis of the evidence adduced at the hearing, the Regional Director concluded that Scott, among others, was not a supervisor and directed an election.

The Request for Review filed by the Respondent was denied on the ground that it raised "no substantial issues warranting review." Following an election in which the union received a majority, Respondent refused to bargain

and raised as part of its defense the supervisory authority of Ivory Scott and the acts of Scott as agent for the union. The General Counsel moved for summary judgment, which was granted by the Trial Examiner, who refused to review the Regional Director's Decision, stating (Trial Examiner's Decision p. 5, 1. 17-23) :

Equally the contention that the appropriate unit should have excluded the assistant foremen was litigated before the Board in the representation proceeding. In the absence of newly discovered or previously unavailable evidence or special circumstances it is established Board policy not to permit litigation before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior representation proceeding.

That the Trial Examiner relied on the findings on the Regional Director is clear (Trial Examiner's Decision p. 5, 1. 42-44) :

With regard to the fact that Scott solicited authorization cards and participated in the union organizational drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact.

The Trial Examiner's statement that the Board found Scott to be a supervisor is clearly erroneous, since the Board did *not* decide the issue, but in fact merely refused to review the record and to make its own decision. The Trial Examiner and the Board also refused to review the record independently of the Regional Director's conclusions on this issue, as is evident from the failure of both to discuss the merits of the issue of Scott's supervisory authority.

Respondent urges that the standards for review in Section 102.67(c) of the Board's Rules and Regulations run contrary to the intent of Congress since they prevent Respondent from having the Board, as Congress specifically

designated, make the final decision in unfair labor practice cases. The tests for the granting of review are narrow and confining and in most cases where a question of law or policy is not an issue, review will be granted solely on a finding by the Board, based on the Request for Review which must be a "self-contained" document enabling the Board to rule without the necessity of recourse to the record (Section 102.67(d)), that the Regional Director's decision was "clearly erroneous" and there are "compelling reasons" for review. By seeking to avoid "relitigation" of matters, the Board is shirking its responsibility to decide unfair labor practice. See 29 U.S.C. Sec. 160(c); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Circuit Judge Kaufman, writing the Opinion in *Pepsi-Cola Buffalo Btlg. Co. v. NLRB*, *supra*, stated at 3187

In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a regional director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members. Moreover, the Board's experience is particularly relevant and desirable in deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an unfair labor practice are invoked. See *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 20 LRRM 2115 (1947); *Packard Motor Car Co., v. NLRB*, 330 U.S. 485, 19 LRRM 2397 (1947).

On the basis of the above discussion, Respondent requests the Board to review the Decision of the Regional Director and to make its own decision as to whether the Regional Director's determination was correct. Respondent also reserves the defenses raised in its original Exceptions and Brief in Support of Exceptions, despite the limited nature of this Motion for Reconsideration.

Respectfully submitted,

MAGNESIUM CASTING COMPANY

By its attorneys

STONEMAN AND CHANDLER

/s/ LOUIS CHANDLER

/s/ JEROME H. SOMERS

Dated at Boston, Massachusetts

April 29, 1969

Post Office Address :

79 Milk Street

Boston, Massachusetts 02109

(CERTIFICATE OF SERVICE)

[NATIONAL LABOR RELATIONS BOARD]

[Title Omitted]

ORDER DENYING MOTION

On January 28, 1969, Trial Examiner Paul E. Weil of the National Labor Relations Board issued his Decision in the above-entitled proceeding. The Trial Examiner took administrative notice of the record in a related representation proceeding, Case 1-RC-9973, in which the Regional Director in his Decision and Direction of Election, had found, *inter alia*, that Ivory Scott was not a supervisor; the Board had denied review of the Regional Director's finding and the Regional Director had certified the Union. After consideration of the record in the instant case, the Trial Examiner concluded that there were no unresolved issues requiring an evidential hearing. He, therefore, granted the General Counsel's Motion for Summary Judgment, found that the Respondent had refused to bargain with the certified Union in violation of Section 8(a) (5) and (1) of the Act, and recommended that it cease and

¹ 175 NLRB No. 68

desist therefrom and bargain with the Union. The Board, on April 17, 1969, issued a Decision and Order¹ in which it adopted the Trial Examiner's findings, conclusions and recommendations as contained in his Decision, and ordered that the Respondent take the action set forth in the Trial Examiner's Recommended Order.

Thereafter, on May 1, 1969, the Respondent filed a motion for reconsideration of the Board's Decision and Order, contending that the Board's failure to review the record before the Regional Director in Case 1-RC-9973 for the purpose of making its own decision that Ivory Scott was not a supervisor is in violation of the National Labor Relations Act, as held by the United States Court of Appeals for the Second Circuit in *Pepsi-Cola Buffalo Bottling Co. v. N.L.R.B.*, — F.2d —, (March 25, 1969), petition for rehearing denied May 15, 1969. The Respondent requests that the Board independently review the Regional Director's decision and determine whether or not the Regional Director's decision that Ivory Scott was not a supervisor was correct.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondent's motion for reconsideration be, and it hereby is, denied as lacking merit.²

Dated, Washington, D. C., August 11, 1969

By direction of the Board:

/s/ GEORGE A. LEET

Associate Executive Secretary

² With due deference to the Second Circuit's decision in *Pepsi-Cola Buffalo Bottling Company v. N.L.R.B.*, supra, the Board disagrees therewith and adheres to its previous position until such time as the Supreme Court of the United States rules otherwise.

[NATIONAL LABOR RELATIONS BOARD]

[Title Omitted]

MOTION TO REOPEN HEARING AND TO
ADDUCE ADDITIONAL EVIDENCE

Comes now Magnesium Casting Company, Respondent in the above-entitled matter, and pursuant to Section 102.48(d) of the Board's Rules and Regulations, moves the Board for leave to adduce the following additional evidence and to reopen the record:

(1) Of the two hundred fifty-seven (257) employees in the unit the Board deemed appropriate who were on the election eligibility list for the payroll period ending May 22, 1968, one hundred seventy-eight (178) employees are no longer employed.

(2) Presently there are two hundred forty-two (242) new employees who were not on the eligibility list to vote in the election of June 21, 1968.

(3) Presently there are three hundred twenty-one (321) employees in the unit the Regional Director deemed appropriate, of which approximately eighty (80) were employed and on the eligibility list to vote in the election of June 21, 1968.

(4) The turnover described in (1), (2) and (3) above resulted substantially from normal attrition and from fluctuations in employment requirements which are dependent upon variations in customer commitments.

Respondent respectfully submits that the above evidence based on its current payroll records, requires the Board to modify its order dated April 17, 1969, so as to eliminate the requirement that Respondent engage in collective bargaining with the United Steelworkers of America, AFL-CIO. The dissolution of the alleged majority occurred as a result of factors devoid of any evidence of unfair labor practices by Respondent. That the alleged majority cannot possibly exist is a mathematical certainty, since *only twenty-*

five percent (25%) of the employees on the eligibility list are presently employed. In view of the change in the identity of the employees, the course of action required in the Board's order is markedly inconsistent with the purposes of the Act — namely, to permit employees to freely choose whether or not they wish to be represented in collective bargaining and, if so, by whom. *Clark's Gamble Corp. v. NLRB*, (CA 6, 1969) 70 LRRM 2625.

In *NLRB v. Superior Fireproof Door & Sash Co.*, (CA 2, 1961) 289 F.2d 713, 47 LRRM 2816, under comparable facts to the case at bar the Court modified a Board bargaining order and ordered a new election. Equally applicable in the immediate case is the reasoning of the Court, at 2824:

"We are fully cognizant of the arguments why in many cases a certified union ousted by unfair labor practices of an employer should not be subjected to an election, but these have more force in cases of illegal assistance to a rival union or of the violent anti-union practices of earlier years than to anything shown here; and their force also must diminish with the passage of time. *Nor may we forget that the interests to be protected are primarily those of the employees* (emphasis added)

In the present case it is important to note that the Company has not been charged with anti-union practices. See also *NLRB v. Adhesive Products Corp.*, (CA 2, 1960) 280 F.2d 89, 46 LRRM 2685; *Marcus Trucking Co.*, (CA 3, 1961) 286 F.2d 583, 47 LRRM 2524.

In *NLRB v. Koppel Co.*, (CA 3, 1969) 71 LRRM 2531, 2535, fn. 16, the Court urged the Board to consider whether the evidence to be adduced at a remanded hearing establishes that the change in identity of the Company's employees has been substantial and if so, consider the propriety of issuing a bargaining order as against ordering

an election. As Judge Anderson stated in *NLRB v. Flo-matic Corp.*, (CA 2, 1965) 347 F.2d 74, at 78, 59 LRRM 2535, we should not "unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees."

In view of the new evidence outlined above which Respondent seeks to adduce at a hearing and its effect upon the Board's final order as it pertains to the purposes of the Act — namely, to protect the employees' free choice to engage in or to refrain from engaging in organizational activity for the purpose of collective bargaining or to determine who, if they so wish, shall be their collective bargaining agent, Respondent urges the Board to grant this motion for leave to reopen the hearing to adduce the additional evidence.

Respectfully submitted,
 STONEMAN AND CHANDLER
 /s/ LOUIS CHANDLER
 /s/ JEROME H. SOMERS

September 25, 1969
 79 Milk Street
 Boston, Massachusetts 02109
 [CERTIFICATE OF SERVICE OMITTED]

[NATIONAL LABOR RELATIONS BOARD]
 [Title Omitted]

ORDER DENYING MOTION

On January 28, 1969, Trial Examiner Paul E. Weil of the National Labor Relations Board issued his Decision in the above-entitled proceeding. The Trial Examiner took administrative notice of the record in a related representation proceeding, Case 1-RC-9973, in which the Regional Director, in his Decision and Direction of Election, had found, *inter alia*, that Ivory Scott was not a supervisor; the Board had denied review of the Regional Director's finding; and

the Regional Director had certified the Union. After consideration of the record in the instant case, the Trial Examiner concluded that there were no unresolved issues requiring an evidential hearing. He, therefore, granted the General Counsel's Motion for Summary Judgment, found that the Respondent had refused to bargain with the certified Union in violation of Section 8(a)(5) and (1) of the Act, and recommended that it cease and desist therefrom and bargain with the Union. The Board, on April 17, 1969, issued a Decision and Order¹ in which it adopted the Trial Examiner's findings, conclusions and recommendations as contained in his Decision, and ordered that the Respondent take the action set forth in the Trial Examiner's Recommended Order.²

Thereafter, on September 26, 1969, the Respondent filed a motion to reopen the hearing to adduce additional evidence, contending that the turnover of employees and expansion of the unit since the election requires the Board to modify its April 17, 1969, Order and eliminate the Respondent's obligation to bargain with the Union. The General Counsel and the Charging Party filed opposition to the motion.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondent's motion to reopen the hearing and to adduce additional evidence be, and it hereby is, denied as lacking in merit.

Dated, Washington, D. C., October 22, 1969

By direction of the Board:

GEORGE A. LEET

Associate Executive Secretary

¹ 175 NLRB No. 68.

² The Board on August 11, 1969, denied as lacking in merit the Respondent's motion for reconsideration of the Regional Director's decision in Case 1-RC-9973 that Ivory Scott was not a supervisor.

[UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]

[Title Omitted]

APPLICATION FOR ENFORCEMENT OF
AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the First Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully applies to this Court for the enforcement of its Order against Respondent, its officers, agents, successors, and assigns, Case No. 1-CA-6498.

In support of this application the Board respectfully shows:

(1) Respondent is engaged in business in the State of Massachusetts, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this application by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) On December 3, 1968, the General Counsel filed a motion for summary judgment, requesting that an order for summary judgment be entered. On the same date, an order referring motion for summary judgment was referred to the Trial Examiner. On December 6, 1968, the Trial Examiner issued an order to show cause on motion for summary judgment. On January 2, 1969, the Respondent filed an answer to the order to show cause. Thereafter, on January 28, 1969, the Trial Examiner issued his Decision in which he *inter alia* granted the General Counsel's Motion for Summary Judgment.

(3) Upon due proceedings had before the Board in said matter, the Board on April 17, 1969, duly stated its find-

ings of fact and conclusions of law and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure, the Board will certify and file with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this application and transcript to be served upon Respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a judgment enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST
 MARCEL MALLET-PREVOST
Assistant General Counsel
 NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
 this 10th day of November 1969

[Certificate of Service Omitted]

[UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]

[Title Omitted]

ANSWER TO PETITION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the First Circuit:

Respondent, Magnesium Casting Company, answering the petition for enforcement of an order of the National Labor Relations Board, which petition has been filed herein by the National Labor Relations Board, respectfully shows as follows:

1. Respondent admits the allegations stated in paragraph 1 bearing upon the jurisdiction of the Court but denies that it committed any unfair labor practices.

2. Respondent admits that the General Counsel filed a Motion for Summary Judgment, that said Motion was referred to the Trial Examiner, that the Trial Examiner issued an Order to Show Cause on said motion, that Respondent filed an Answer to the Order to Show Cause and that the Trial Examiner issued his Decision granting said Motion, all on the stated date in paragraph 2.

3. Respondent admits the issuance of the Board's order and its service upon Respondent, but denies that due proceedings were had before the Board prior to issuance of the Board's Order.

4. Respondent respectfully urges:

- a) that the Decision and Order of the Board are without foundation in law, and are contrary to law;
- b) that the Respondent was denied due process in the proceedings before the Trial Examiner and the Board;
- c) that the findings of fact are not supported by substantial evidence on the record as a whole.

WHEREFORE, Respondent, Magnesium Casting Company, prays this Honorable Court, that it make and enter its decree denying the Petition for Enforcement and vacating the Order of the National Labor Relations Board.

Respectfully submitted,
MAGNESIUM CASTING COMPANY

By its Attorneys
STONEMAN AND CHANDLER

By (s) LOUIS CHANDLER
LOUIS CHANDLER

By (s) JEROME H. SOMERS
JEROME H. SOMERS

Dated at Boston, Massachusetts

December 1, 1969

Post Office Address:

79 Milk Street

Boston, Massachusetts 02109

[Certificate of Service Omitted]

[UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]

No. 7462.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
MAGNESIUM CASTING COMPANY,
RESPONDENT,
and
UNITED STEELWORKERS OF AMERICA,
INTERVENOR.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Before ALDRICH, *Chief Judge*,
COFFIN, *Circuit Judge*, and BOWNES
District Judge.

Abigail Cooley Baskir, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Marshall F. Berman*, Attorney, were on brief, for petitioner.

Jerome H. Somers, with whom *Louis Chandler* and *Stoneman and Chandler* were on brief, for respondent.

May 21, 1970.

COFFIN, *Circuit Judge*. On the basis of the evidence adduced at a unit determination hearing on March 14, 1968, the Regional Director concluded that six of the seven assistant foremen whose status was in dispute were employees rather than supervisors and thus includible in the proposed bargaining unit at the Magnesium Casting Company plant in Hyde Park, Massachusetts. The Company's Request for Review, contending that three of the six — Scott, Morris, and Massey — were supervisors, was denied

by the Board as raising no substantial issues warranting review. On June 21, the United Steelworkers of America won the election 140 to 59.

Pursuing the accepted method for challenging such unit determinations, *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-477 (1964), the Company refused to bargain with the Union. The Company's answer to the ensuing unfair labor practice complaint renewed the contention concerning the status of Scott, Morris, and Massey. In response to the General Counsel's Motion for Summary Judgment, the Company asserted the existence of newly discovered evidence concerning Scott's status and his activities on behalf of the Union. The Trial Examiner granted the Motion for Summary Judgment, concluding that the Company's evidence regarding Scott was not newly discovered and thus that the Regional Director's determination in the representation proceeding should be followed. The Board affirmed the Summary Judgment and adopted the Trial Examiner's conclusion that the Company had committed an unfair labor practice by its refusal to bargain.

Thereafter, the Company filed a Motion for Reconsideration with the Board, contending that the holding in *Pepsi-Cola Buffalo Bottling Co. v. N.L.R.B.*, 409 F.2d 676 (2d Cir. 1969), *cert. denied*, 396 U.S. 904 (1969), required the Board to make its own findings of fact regarding the status of Scott, Morris, and Massey. Noting its disagreement with the *Pepsi-Cola* rule, the Board denied the Motion, and comes to us seeking enforcement of its order to bargain.

I.

The Company's initial contention is that the inclusion of Scott, Morris, and Massey in the bargaining unit was improper because all three are supervisors within the meaning of the NLRA, 29 U.S.C. § 151 *et seq.* Under section 9 of the Act, only "employees" are properly includible in a bargaining unit, which provision combines with the sec-

tion 2(3) definition of "employee" to exclude from the bargaining unit "any individual employed as a supervisor". Section 2(11) defines "supervisor" as

"... any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, *if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.*"

[Emphasis added.]

Since the definition is set forth in the disjunctive, it is generally agreed that the possession of any one of the listed powers is sufficient to confer "supervisory" status, e.g., *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1173 (2d Cir. 1968); *N.L.R.B. v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1089 (8th Cir. 1969), as long as "such authority is not merely of a routine or clerical nature, but requires the use of independent judgment". See, e.g., *Amalgamated Clothing Workers v. N.L.R.B.*, 420 F.2d 1296, 1300 (D.C. Cir. 1969).

Nevertheless, as Judge Woodbury stated in *N.L.R.B. v. Swift and Company*, 292 F.2d 561, 563 (1st Cir. 1961),

"... the gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor'."

With that in mind, the Regional Director's determination should be sustained if supported by substantial evidence.

The instant case presents one of those situations where

the gradations of authority are particularly difficult to ascertain. The company has approximately 250 employees in the unit found appropriate, some 22 of whom work in the Products Division. Within that Division there are two sections—one for plating and finishing, another for assembly and packaging—each with 10-12 men under the supervision of a foreman, both of whom are conceded to be “supervisors.” It is within these 10-12 man sections that the present controversy arises. The Company contends that all four assistant foremen are also supervisors; the Regional Director found that only Zagrafos—who worked with 9 employees and had exercised supervisory powers on several occasions—was a supervisor, and that Morris, Massey, and Scott were not.

Morris and Massey are employed in the assembly and packaging section of the Products Division. Working with 2-4 others in separate groups, each performs routine supply and inspection functions in addition to the normal packaging work of the section. Both are paid somewhat more than their fellow workers, but substantially less than their foreman. Neither has ever exercised any of the powers specified in section 2(11).¹ Both refer any important decisions to their foreman, who makes the daily work assignments and checks the work of each of the men in the section, including Morris and Massey, at regular 10 minute intervals throughout the working day. Whatever responsibility these assistant foremen may have vis-a-vis their fellow workers, it is of a fairly routine nature; while some judgment is obviously required to determine what problems

¹ We accept the proposition that possession of section 2(11) authority is sufficient, and that such authority may be possessed even though it has not been exercised. *E.g.*, *N.L.R.B. v. Leland Gifford Co.*, 200 F.2d 620, 625 (1st Cir. 1952); *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra* at 1173. However, in cases where possession of such authority is disputed, lack of exercise thereof is one factor in determining whether or not the authority is indeed possessed.

should be referred to the foreman, such judgments hardly suggest a finding of "supervisory" status. We are troubled by their attendance at bi-weekly "management" meetings but that one factor does not alter the substantial evidence that these men are not supervisors.

Scott presents more difficulty. He is specially trained to perform the critical plating function in the Products Division. During his seven months as an assistant foreman, he once recommended a raise for a fellow worker who soon thereafter received it, and he once prevailed on another employee—by threatened loss of job—not to leave work abruptly in the middle of the day. However, it does not strike us as unusual that the most skilled of three or four men in a shop would command respect from his co-workers and his foreman even though he possessed no "supervisory" powers. Moreover, the quality control work in which he engages concerns the products themselves and only indirectly reflects on his own work and that of the other employees; he is *not* charged with the responsibility of assessing their general capabilities. Compare *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra* at 1174-1177. As with Morris and Massey, however, his frequent attendance at the "management" meetings lends credibility to the Company's contentions.

However, if "deference to expertise" and "substantial evidence" mean anything in this area of labor law, it is that courts should not substitute their judgment in the close cases. We have found only one recent decision where the Board's determination that certain men were not supervisors was reversed by a court of appeals. *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra*; compare *Illinois State Journal-Register, Inc. v. N.L.R.B.*, 412 F.2d 37 (7th Cir. 1969); *N.L.R.B. v. Little Rock Downtowner, Inc.*, *supra* at 1089; *N.L.R.B. v. Swift and Company*, *supra* at 563. *Metropolitan Life* presented a much clearer case of "super-

visory" status than do the inconclusive facts regarding Scott. We hold that the Regional Director's determination with regard to these three men is supported by substantial evidence.

Additionally, the Company contends that the Trial Examiner erred in refusing to consider its "new evidence" concerning the status and activities of Scott. We have just recently demonstrated our readiness to require trial examiners to hear such evidence when appropriately presented. *N.L.R.B. v. Maine Sugar Industries, Inc.* F.2d

(1st Cir., May 15, 1970). However, because of the great potential for delay through this avenue, it is not unfair to require the offeror of such belated evidence to spell out what he has and why he could not have produced it at the appropriate time. The Company's first proffer merely stated that Scott had "admittedly withheld information ... concerning his full responsibilities and authority as an assistant foreman", without in any way indicating what that information was. The Company's other offers of proof seem clearly to address matters within its knowledge at the representation hearing, with no explanation as to why such proof was not then offered. The Trial Examiner's refusal, therefore, was not error.

Since all three disputed workers are employees and thus were properly included in the bargaining unit, the Board's order is supported by substantial evidence and we have no occasion to concern ourselves with Scott's activities on behalf of the Union or with the issue raised in *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra* at 1178.

II.

Our conclusion above does compel us to confront the issue set forth and discussed in *Pepsi-Cola Buffalo Bottling*, *supra* at 679-681: whether the National Labor Relations Board must make its own findings of fact before it can conclude that a Company has committed an unfair labor

practice by its admitted refusal to bargain. The Board in our case adhered to its "rule against relitigation", which provides in effect that the Board's denial of review of the Regional Director's findings of fact, after review of a summary of the evidence and the law prepared by the Company, is sufficient. 29 C.F.R. § 102.67(d)(f). The *Pepsi-Cola* decision struck down that part of the rule which allows the Board to find an unfair labor practice without making its own findings, which holding has apparently been embraced by the Fourth Circuit. *N.L.R.B. v. Clement-Blythe Companies*, 415 F.2d 78, 82 (4th Cir. 1969). More recently, however, *Pepsi-Cola* has been distinguished by another panel of the Second Circuit, with Judge Friendly expressing his doubts about the *Pepsi-Cola* decision. *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187, 1190 (2d Cir. 1970).² Having previously cited *Pepsi-Cola* in dicta as the existing law on this point—*N.L.R.B. v. Chelsea Clock Co.*, 411 F.2d 189, 192 (1st Cir. 1969)—we now must decide whether to follow that decision.

Viewing the problem as tabula rasa, there may be some merit to the propositions that discretionary review by the Board is not a sufficient guarantee of the exercise of the expertise attributed to the Board; that section 10(c) of the Act requires the Board to make its own determinations of fact in unfair labor practices cases, see *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 492 (1951); and that Congressional rejection of proposals to delegate final authority to hearing examiners suggests a similar reluctance to delegate such authority to Regional Directors, *Pepsi-Cola Buffalo Bottlers*, *supra* at 681.

But the slate was etched rather clearly, we think, when Congress amended section 3(b) of the Act, 28 U.S.C.

² *Pepsi-Cola* has also been distinguished in *State Farm Mutual Auto Ins. Co. v. N.L.R.B.*, 413 F.2d 947 (7th Cir. 1969); see also *N.L.R.B. v. Process Corp.*, 412 F.2d 215, 217-218 (7th Cir. 1969).

§ 153(b), in 1959. Section 3(b) begins by authorizing the Board to delegate to three or more of its members "any and all of the powers which it may exercise", and then, as amended, provides that "[t]he Board is also authorized to delegate to its regional directors its power under section [9 of the Act] ... to determine the unit appropriate for the purposes of collective bargaining ... except that the Board may review any action of the Regional Director ..." Taken together, the two provisions reflect a Congressional decision to allow the Board — within the specified limits — to permit its delegates to act in its stead.

The Company contends that the section 3(b) amendment *on its face* confines the Regional Directors to the exercise of powers under section 9, and thus that a Regional Director's unit determination pursuant to section 9 can have no effect in a subsequent unfair labor practice proceeding under section 10. That argument, however, overlooks the well established principle that when the Board resolves an issue in a representation proceeding under its section 9 powers,³ it is *not* required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under section 10. *E.g.*, *Pittsburgh Plate Glass Co. v. Labor Board*, 313 U.S. 146 (1941); *Amalgamated Clothing Workers v. N.L.R.B.*, 365 F.2d 898, 902-904 (D.C. Cir. 1966); *Riverside Press, Inc. v. N.L.R.B.*, 415 F.2d 281, 284 (5th Cir. 1969). Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the Director's determination — when not set aside by the Board — is entitled to the same weight in the subsequent proceeding that the Board's own determination would have been accorded.

³ The Board may be called on to make such determinations, either after accepting a Request for Review or after transfer of the case by the Regional Director. See 29 C.F.R. § 102.67.

The legislative history behind the section 3(b) amendment, while not extensive, confirms the breadth of the intended delegation. Senator Goldwater, a member of the Conference Committee which had inserted this amendment which had not appeared in the bills passed by the House and Senate, offered the most complete explanation for the amendment. The purpose was "to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination." It was made clear that the regional directors would be "required to follow the lawful rules, regulations, procedures, and precedents of the Board and to act in all respects as the Board itself would act." As one safeguard against possible abuse of the delegated power the Board was assured the right of continuous supervision over its delegates, so that the Board could "refuse to delegate authority to handle all or any part of the proceedings in contested representation cases." 2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1856(2) (1959) (Remarks of Senator Goldwater).⁴

We draw two conclusions from the amendment and this history. First, the primary purpose behind the amendment was the desire to expedite the final disposition of a part of the Board's caseload. The Board delegated its authority over elections and certifications, and, by its "rule against

⁴ We note also that both Congressman Griffin—co-sponsor of the House bill and an active advocate for the Conference version which eventually became law—and Congressman Barden—Chairman of the House Committee on Education and Labor whose earlier bills, H.R. 4473 and 4474, contained the first mention of the section 3(b) amendment—inserted brief explanations of the section 3(b) amendment about ten days prior to final passage. 2 NLRB Legislative History, 1811(3), 1812(3). Both focused primary attention on the Board's ability to require adherence by its Regional Directors to its rules and precedents. Were the Board additionally expected to make its own findings, there would be no reason for this concern to be voiced at all.

relitigation", decided that all issues finally resolved in such proceedings need not be redetermined in the ensuing unfair labor practice proceeding. Thus, while the Company's interpretation — based on *Pepsi-Cola* — would expedite only elections and certifications but not the disposition of the issues resolved therein, the Board's interpretation makes it unnecessary to redetermine each of those issues, thereby effectuating the Congressional purpose more completely.

Secondly, the section 3(b) delegation of authority to the Regional Directors suggests to us a Congressional judgment that the Regional Directors have an expertise concerning unit determinations sufficiently comparable to the Board's expertise that such determinations may be left primarily to the Regional Directors, subject to the Board's discretionary review. Given this determination that the Board's expertise need only be fully brought to bear on those unit determinations which the Board chooses to review, no unfairness arises from the fact that the Regional Director's determination, after denial of review by the Board, is adopted by the Trial Examiner and the Board in the ensuing unfair labor practice proceeding.

Furthermore, it is important to recognize that Congress did build in a second safeguard against possible abuse by the Regional Directors of the delegated powers. 2 NLRB Legislative History, 1811(3) (Remarks of Congressman Griffin); *ibid.*, 1812(3) (Remarks of Congressman Barden). In both the representation proceeding and the unfair labor practice proceeding, the "ultimate decision" remains with the Board, just as much as in *N.L.R.B. v. Duval Jewelry Co.*, 357 U.S. 1, 8 (1957), where the Court upheld the Board's delegation of some of its authority to an agent because "ultimate decisions on the merits of all the issues coming

before him is left to the Board'', although recourse to the Board there, as here, was solely a matter of the Board's discretion.

The Company makes much of the argument that the Board has never reviewed the actual evidentiary record in this case. However, that statement is misleading, for the Board did review the evidence as summarized by the Company in its Request for review, 29 C.F.R. § 102.67(d), and on that basis it concluded that the Company's claims regarding the status of the three assistant foremen presented no substantial issues warranting review. It is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contentions.⁵ Of course there is nothing to stop the Board from itself reconsidering the evidence adduced in the representation proceeding which is before it in the unfair labor practice proceeding. See 29 C.F.R. § 102.48(b).

The Fourth Circuit, embracing the *Pepsi-Cola* rule, was most persuaded by the absence of any findings by the Board for the courts of appeals to review. *N.L.R.B. v. Clement-Blythe Companies*, 415 F.2d at 81-82. However, both Senator Goldwater's remarks and the Board's own rules make clear that the Regional Director is required to follow the same rules as the Board, so that findings of fact by him must be forthcoming. 29 C.F.R. § 102.67(b). Moreover, the Board's rules make clear that the Regional Director's determinations, if adopted by the trial examiner in the unfair labor practice proceeding, will accompany the case first to the Board—29 C.F.R. § 102.45(a)—and then to the

⁵ The adequacy of this procedure is illustrated by the record before us. The Request for Review contained a complete summary of the relevant evidence, with page references to the transcript of the hearing, as well as a fully documented legal memorandum. In effect, the procedure enables the protestant to marshal its facts and law relevant to the point in issue. If the Board chooses to deny review, its action is one informed by a focused presentation. It cannot fairly be called rubber stamping, with the blind automaticity which the term connotes.

appropriate court of appeals. 29 C.F.R. § 101.14; 29 U.S.C. § 10(d). In the case presently before us, the Regional Director's findings of fact which had been adopted by the trial examiner and by the Board were as complete and "reviewable" as any we have received from the Board. We therefore reject the notion that either section 10(c) of the Act or the Administrative Procedure Act, 5 U.S.C. § 557, is offended by the fact that we review the Regional Director's findings which have been adopted by the Board.

The Second Circuit's recent effort — *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d at 1190 — to confine the *Pepsi-Cola* holding seems to us an unsatisfactory compromise: actual Board review and determination is only required where the issue "is difficult and requires a fine-drawn balancing of facts and law". We shrink from the prospect of attempting such characterizations; in the case before us involving the issue of "supervisory" status, the question seemed difficult only with regard to one of the three assistant foremen. Perhaps the Board determined, in its expertise, that the issues here presented were *not* difficult ones when it concluded that the Company's contentions presented no issue warranting review. Are we now to tell the Board that we think it was wrong with regard to one of the three men, that it must review his status because we think the question a close one? Surely that approach would frustrate rather than foster the expeditious disposition of cases intended by Congress. We conclude that the Board's expertise was brought to bear to the extent required by section 3(d) when it denied review of the Regional Director's determination.

We therefore part company with both recent decisions of the Second Circuit, and hold that the procedure followed by the Board in this case satisfies the requirements of the National Labor Relations Act, the Administrative Procedure Act, and the demands of procedural fairness.

The Company's final contention is that it should be relieved of its duty to bargain because of a substantial turnover of its employees since the election. The Company's unfair labor practice, its refusal to bargain, having caused this delay since election, the Board's refusal to set aside the election is sustained. *Cf. N.L.R.B. v. Better Val-U Stores of Mansfield, Inc.*, 401 F.2d 491, 494-495 (2d Cir. 1968).

The petition for enforcement is granted.

[UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]

No. 7462.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

MAGNESIUM CASTING COMPANY,
RESPONDENT.

UNITED STEELWORKERS OF AMERICA,
INTERVENOR.

DECREE

Entered May 21, 1970

This cause came on to be heard upon petition for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board of April 17, 1969, is hereby affirmed and enforced.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]
[Title Omitted]

RESPONDENT'S MOTION FOR
STAY OF MANDATE

Respondent, Magnesium Casting Company, moves this Court stay operation of its mandate pending Respondent's petition for writ of certiorari which will present to the Supreme Court of the United States the following question:

Did the National Labor Relations Board err in finding that Respondent violated Section 8(a)(5) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.) when it refused to bargain with a newly-certified union, where the Board denied Respondent's request for review of the regional director's unit determination on the grounds that the request did not raise issues sufficiently substantial to warrant review and the Board refused to make its own determination or give plenary review to the regional director's determination before entering an unfair labor practice order based on such determination, where Section 10(c) of the Act requires that the Board itself must determine if a party has committed an unfair labor practice?

In *Pepsi-Cola Buffalo Bottling Company v. National Labor Relations Board*, 409 F.2d 676 (1969), the United States Court of Appeals for the Second Circuit answered the above question in the affirmative and the Supreme Court of the United States denied certiorari, 396 U.S. 904. In *NLRB v. Clement-Blythe Companies*, 415 F.2nd 78 (1969), the United States Court of Appeals for the Fourth Circuit agreed with the *Pepsi-Cola* decision. In the immediate case this Court specifically rejected the decisions of these two circuit courts and answered the above question in the negative.

In view of the conflict in the decisions of the circuit courts and the importance of this issue to the merits of this matter, Respondent moves this Court stay its mandate pending application by Respondent to the Supreme Court for writ of certiorari. Counsel for Respondent certifies that this Motion is not for the purpose of delay.

Respectfully submitted,

(s) LOUIS CHANDLER

LOUIS CHANDLER

(s) JEROME H. SOMERS

JEROME H. SOMERS

STONEMAN AND CHANDLER

79 Milk Street

Boston, Massachusetts

Counsel for Respondent

Dated at Boston, Massachusetts

this 28th day of May, 1970

[Certificate of Service Omitted]

[UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT]

[Title Omitted]

ORDER OF COURT

Entered May 29, 1970

Upon motion of respondent,

It is ordered that the decree of this Court of May 21, 1970, be, and the same hereby is, stayed pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court of the United States, the same to be filed by July 10, 1970.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[SUPREME COURT OF THE UNITED STATES]

No. 370, OCTOBER TERM, 1970

MAGNESIUM CASTING COMPANY,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ORDER ALLOWING CERTIORARI. Filed October 12, 1970.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.
